159 U.S. 658

# TRANSCRIPT OF RECORD.

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## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1895.**

No. 661.

J. N. GILLIS, JOHN T. FAXON, ADMINISTRATOR OF THE ESTATE OF F. B. RICE, DECEASED, AND J. N. VOSS, PLAINTIFFS IN ERROR,

*vs.*

A. W. STINCHFIELD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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**FILED JULY 19, 1895.**

**(15,951.)**

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 9, 1895.

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a In the Supreme Court of the State of California.

A. W. STINCHFIELD, Plaintiff and Respondent,
*vs.*
J. N. GILLIS, JOHN T. FAXON (Administrator of the Estate of F. B. Rice, Deceased), and J. N. Voss, Defendants and Appellants.
} No. 18315.

*Transcript.*

F. W. Street and J. F. Rooney, attorneys for appellants.

Filed Feb. 15th, 1894.

L. H. BROWN, *Clerk*,
By W. H. GOVAN, *Deputy*.

1 In the Supreme Court of the State of California.

In the Superior Court of the County of Tuolumne, State of California.

1a

A. W. STINCHFIELD, Plaintiff and Respondent,
*vs.*
J. N. GILLIS, JOHN T. FAXON (Administrator of the Estate of F. B. Rice, Deceased), and J. N. VOSS, Defendants and Appellants.

*Complaint.*

(Title of Court and Cause.)

Plaintiff complains of the defendants above named, and for cause of action alleges:

I.

That during all the times hereinafter mentioned the plaintiff was,
and now is, the owner of, and in the possession of, and enti-
2 tled to the possession of, all that certain quartz mining claim,
vein, lead or lode situate in the county of Tuolumne, State of
California, and more particularly described as follows, to wit:

"Being situate on Jackass hill, about one mile from the town of Tuttletown, and commencing at a monument of stone marking the southwest corner of the Atlas mine. Thence running 171 feet in a northwesterly direction to a stake in monument of stone. Thence running in a southeasterly direction 750 feet, more or less, to a stake in stone mound. Thence easterly 171 feet to a tree blazed on two sides, with stones around it. Thence northwest 750 feet, more or less, to the place of beginning. Being that certain quartz claim known as the Pine Tree mine, and bounded on the north and east by the Atlas and Wilson and Means mines, and on the west by the Carrington mine, and on the south by the Chilano mine.

## II.

That the said above-described mining claim is of value only for the gold-bearing earth and rock therein contained.

## III.

3 That in the month of February, 1888, the defendants, wilfully and knowingly, and without plaintiff's knowledge or consent and against his will, entered upon and into the plaintiff's said above-described mining claim, and did thereafter at divers times down to and including the month of September, 1888, wilfully and knowingly, and without plaintiff's knowledge or consent and against his will, work and mine in plaintiff's said mining claim, and did extract and carry away from plaintiff's said mining claim and convert to their own use, as plaintiff is informed and believes, gold and gold-bearing earth and rock of the value of ten thousand dollars, to plaintiff's loss and damage in the said sum of ten thousand dollars.

Wherefore plaintiff demands judgment against defendants for the sum of ten thousand dollars, and for the costs of this action.

I. M. KALLOCH,
*Plaintiff's Attorney.*

STATE OF CALIFORNIA, }
*County of Tuolumne,* } *ss:*

A. W. Stinchfield, being duly sworn, says that he is the plaintiff in the above-entitled action, that he has heard read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge, except as to matters which are therein stated on information and belief, and that as to those matters he believes it to be true.

A. W. STINCHFIELD.

4 Subscribed and sworn to before me this 8th day of January, 1890.

I. M. KALLOCH,
*Notary Public.*

Filed, January 9, 1890.

JOSEPH FITZGERALD, *Clerk.*

### *Answer.*

(Title of Court and Cause.)

Now comes the defendants above named, and for their answer to plaintiff's complaint deny:

That in the month of February, 1888, or at any time thereafter or at all, said defendants or either of them, entered either upon or into the mining claim in the complaint described. Deny that said defendants, or either of them at any time, have ever worked and mined, or worked or mined, in said mining claim or in any part

thereof. Deny that said defendants or either of them, ever at any time, either extracted or carried away from said mining claim any gold, or gold-bearing earth, or gold-bearing rock, of the value of ten thousand dollars, or of any value whatever, or at all. Deny that said defendants or either of them ever at any time converted to their own or any use, any gold, or gold-bearing earth, or gold-bearing rock of any value whatever or at all from said
5 mining claim, or that in any manner belonged to said plaintiff. Deny that plaintiff by any act or acts of said defendants or either of them, has sustained loss, or been damaged in the sum of ten thousand dollars, or in any sum whatever.

Wherefore defendants ask, that they may be hence dismissed with their costs.

F. W. STREET,
*Attorney for Defendants.*

STATE OF CALIFORNIA, } ss:
*County of Tuolumne,*

J. N. Gillis, being first duly sworn deposes and says: That he is one of the defendants in the above-entitled action, that he has read the foregoing answer and knows the contents thereof, that the same is true of his own knowledge except as to the matters which are therein stated on information and belief, and as to those matters he believes it to be true.

JAMES N. GILLIS.

Subscribed and sworn to before me this 24th day of February, 1890.

F. W. STREET,
*Notary Public.*

Due service of the within answer hereby admitted this 24th day of February, 1890.

I. M. KALLOCH,
*Attorney for Plaintiff.*

6 Filed, February 24th, 1890.
JOSEPH FITZGERALD, *Clerk.*

*Amended Answer of John C. Voss.*

(Title of Court and Cause.)

Now comes the defendant John N. Voss, in the above-entitled action and, by leave of the court first obtained, files this, his amended answer, to plaintiff's complaint.

And denies that in the month of February, 1888, or at any other time thereafter or at all, defendant entered upon or into the mining claim in the complaint described.

Denies that the said defendant ever worked and mined, or worked or mined, in said mining claim or in any portion thereof.

Denies that said defendant ever at any time either extracted or carried away from said mining claim any gold-bearing rock or gold of the value of ten thousand dollars or of any value whatever or at all.

Denies that said defendant ever at any time converted to his own use any gold or gold-bearing earth or gold-bearing rock of any value whatever or at all, from said mining claim or that in any manner belonged to said plaintiff.

7 Denies that said plaintiff by any act or acts of said defendant, has sustained damages or loss in the sum of ten thousand dollars, or in any sum whatever.

And further answering said complaint, defendant avers that for a long time prior to the 17th day of January, 1886, and down to the said last-mentioned date, the defendant Gillis, was the owner of the mining claim in the complaint described and known as the Pine Tree mine, and that from the fourth day of June, 1872, down to the present time, said defendant Gillis was and has been the owner of that other certain mining claim, situated on Jackass hill, in the county of Tuolumne and State of California, bounded on the east by the Pine Tree mine aforesaid, and being ten hundred feet in length along the vein and one hundred feet in width on each side from the center of said vein and known as the Carrington mine.

Defendant further avers, that there are several veins or lodes of gold-bearing quartz upon the said Carrington mine. That the said veins or lodes have their apexes upon the said Carrington mine, and that in their course downward into the earth dip towards the east and penetrate the said Pine Tree mine.

8 That on or about the month of May, 1885, the said defendant Gillis, by a verbal lease, demised, let and leased unto one F. B. Rice (now deceased) for the term of five years, then next ensuing, certain of said veins, or lodes, having their apexes upon the said Carrington mine, with the right to enter upon, dig and excavate the same, and to follow said veins or lodes on their dip, take and appropriate the gold found therein, and to pay to the said defendant Gillis, one-fourth of the gross proceeds of all the gold found therein.

That in pursuance of said lease, the said F. B. Rice commenced to work upon certain veins or lodes of quartz, having their apexes on the said Carrington mine, and situated about twenty-seven and one-half feet in a westerly direction from the westerly side-line boundary of the Pine Tree mine, and that the said F. B. Rice continued to work therein and thereon by means of an incline, drifts, excavations and other developments, following said veins or lodes on their dip downward in an easterly direction through the said Carrington mine and into the said Pine Tree mine, to the depth of about fifty-three feet, until about the middle of the month of July or August 1888, at which time the said Rice ceased work thereon.

That in or about the month of January 1887, the said F. B. Rice, with the knowledge and consent of the said defendant Gillis, agreed with this defendant to give defendant an equal interest in the said lease and in the said veins and lodes then discovered and being worked by the said Rice, upon the same terms and conditions upon which the said Rice held and worked the said veins and lodes.

9 That in pursuance of said agreement, the said defendant Voss entered upon and into said veins and lodes and commenced to work thereon, in the said incline, drifts, excavations and other developments with the said Rice, until the middle of the month of July or August, 1888, at which time this defendant ceased work thereon.

That this defendant entered into and upon said veins and lodes and mine in good faith, believing that he had the right so to do, and that he and the said Rice expended in work, tools, improvements, material and money therein more than one thousand dollars; that they developed said veins, lodes and mine and discovered gold therein and paid to said defendant Gillis the one-fourth thereof and appropriated the remainder of the gold equally between themselves.

That during all the time the said Rice and the defendant were working and developing said veins, lodes and mine, the said defendant Gillis, never made any objection to the working of the same by them, and never revoked the rights and privileges granted to them as aforesaid, but on the contrary the said defendant Gillis recognized the right of the said Rice and this defendant to work the said veins, lodes and mine and to appropriate their respective shares of the gold found therein.

10 That prior to the purchase of the Pine Tree mine by the plaintiff from the defendant Gillis, in January 1886, and at the time of said purchase, and from thence down to the commencement of this action in January 1890, the said plaintiff well knew that the said F. B. Rice had leased said veins, lodes and mine from the said defendant Gillis, and the said plaintiff well knew that this defendant was equally interested in said lease of said veins, lodes and mine with the said Rice and knew that they, the said Rice and this defendant were working said veins, lodes and mine, and said plaintiff well knew that said veins, lodes and mine penetrated the said Pine Tree mine, and that the said plaintiff was fully informed of the discovery of gold therein and its appropriation by the said Rice and this defendant, and the said Gillis. And defendant avers, that during all of said time the said plaintiff did not make any objection to their working said veins, lodes or mine on their dip beneath the Pine Tree mine; nor did the said plaintiff claim or demand any of the gold found therein, prior to the commencement of this action, to wit: in the month of January 1890, but on the contrary, defendant avers, that the said plaintiff prior to said last-mentioned date, by his acts and conduct, recognized and acquiesced — the right of the said Rice and this defendant, to work and develop said veins, lodes and mine, and to take and appropriate the gold found therein by them, as aforesaid.

11 Wherefore, defendant, having fully answered, asks to be dismissed with his costs.

J. F. ROONEY,
*Attorney for Defendant.*

STATE OF CALIFORNIA, } ss:
*County of Tuolumne,* }

John N. Voss, being duly sworn deposes and says, that he is one of the defendants in the above-entitled action, that he has heard read the foregoing amended answer, that he knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

JOHN N. VOSS.

Subscribed and sworn to before me this 30th day of January, 1893.

J. F. ROONEY,
*Notary Public.*

Filed January 31, 1893.

D. M. ORTEGA, *Clerk.*

*Amended Answer of J. T. Faxon, Administrator, etc.*

(Title of Court and Cause.)

Now comes the defendant J. T. Faxon, administrator of the estate of F. B. Rice, deceased, and by leave of the court first obtained, files this, his amended answer to plaintiff's complaint.

12 And as such administrator of the estate of F. B. Rice, deceased, denies that in the month of February, 1888, or at any other time thereafter or at all, the said F. B. Rice, entered upon or into the mining claim in the complaint described.

Denies that the said F. B. Rice ever worked and mined, or worked or mined in said mining claim or in any part thereof.

Denies that said F. B. Rice ever at any time either extracted or carried away from said mining claim any gold or gold-bearing rock of the value of ten thousand dollars, or of any value whatever or at all.

Denies that said F. B. Rice, ever at any time converted to his own use any gold, or gold-bearing earth or gold-bearing rock of any value whatever or at all from said mining claim or that in any manner belonged to said plaintiff.

Denies that plaintiff, by any act or acts of said F. B. Rice, has sustained damages or loss in the sum of ten thousand dollars or in any sum whatever.

And further answering said complaint, defendant avers upon information and belief, that for a long time prior to the 17th day of January, 1886, and down to the said last-mentioned date, the defendant Gillis, was the owner of the mining claim in the complaint described and known as the Pine Tree mine, and that from 13 the 4th day of June, 1872, down to the present time said defendant Gillis was and has been the owner of that other certain mining claim situated on Jackass hill, in the county of Tuolumne and State of California bounded on the east by the said Pine Tree mine and being ten hundred feet in length along the vein and one hundred feet in width on each side from the center of said vein and known as the Carrington mine.

Defendant further avers, upon information and belief, that there are several veins and lodes of gold-bearing quartz upon the said Carrington mine. That the said veins and lodes have their apexes upon the said Carrington mine and in their course downward in the earth dip towards the east and penetrate and intersect the said Pine tree mine.

That in the month of May, 1885, the said defendant Gillis, by a verbal lease, demised, let and leased unto the said F. B. Rice for the term of five years then next ensuing, certain of said veins and lodes having their apexes upon the said Carrington mine, with the right to enter upon, dig and excavate the same, and to follow said veins and lodes on their dip, take and appropriate the gold found therein, and to pay to the said Gillis one-fourth of the gross proceeds of all the gold found therein.

14 That in pursuance of said lease, the said F. B. Rice commenced to work upon certain veins or lodes of quartz, having their apexes on the said Carrington mine, and situated about twenty-seven and one-half feet in a westerly direction from the westerly side-line boundary of the Pine Tree mine, and that the said F. B. Rice continued to work therein and thereon by means of an incline, drifts, excavations, and other developments, following said veins and lodes on their dip downward in an easterly direction through the said Carrington mine and into the said Pine Tree mine, to the depth of about fifty-three feet, until about the middle of the month of July or August, 1888, at which time he ceased work thereon.

That in the month of January, 1887, the said F. B. Rice, with the knowledge and consent of the said defendant Gillis, agreed with the defendant J. N. Voss to give him an equal interest in the said lease and in the said veins or lodes then discovered and being worked by the said Rice, upon the same terms and conditions upon which the said Rice held and worked the said veins or lodes.

That in pursuance of said agreement, the said Voss entered into and upon the said veins or lodes and continued to work therein, in the said incline, drifts, excavations, and other developments with the said Rice, until the middle of the month of July or August, 1888, at which time the said Voss ceased work thereon.

15 That the said F. B. Rice and defendant Voss, as this defendant is informed and believes, entered into and upon said veins, lodes and mine in good faith, believing they had the right so to do, and expended in work, tools, improvements, material and money therein more than one thousand dollars; that they developed said veins, lodes and mine and discovered gold therein and paid to said defendant Gillis the one-fourth thereof and appropriated the remainder of the gold equally between themselves.

That during all the time the said F. B. Rice and the defendant Voss were working and developing said veins, lodes and mine, the said defendant Gillis, never made any objection to the working of the same by the said Rice and Voss, or either of them, and never revoked the rights and privileges granted to them as aforesaid, but on the contrary always recognized the right of the said Rice and Voss to work the said veins, lodes and mine and to appropriate their respective shares of the gold found therein.

That prior to the purchase of the Pine Tree mine by the plaintiff, from the defendant Gillis, in January 1886, and at the time of said purchase and from thence down to the commencement of this action in January 1890, the plaintiff well knew that the said F. B. Rice had leased said veins, lodes and mine from the said defendant Gillis and well knew that the defendant Voss was equally 16 interested in said lease of said veins, lodes and mine with the said Rice, and knew that the said Rice and Voss were working said veins, lodes and mine, and well knew that said veins, lodes and mine penetrated the said Pine Tree mine, and that the said plaintiff was fully informed of the discovery of gold therein and of its appropriation by the said Rice and defendants Voss and Gillis; and this defendant avers, that during all of said time the said plaintiff did not make any objection to their working said veins, lodes and mine on their dip beneath the Pine Tree mine. Nor did the said plaintiff claim or demand any of the gold found therein, prior to the commencement of this action, but on the contrary, defendant avers, that said plaintiff, by his acts and conduct recognized and acquiesced in the right of the said F. B. Rice and defendants Voss to work and develop said veins, lodes and mine and to take and appropriate the gold found in the said veins, lodes and mine worked by them as aforesaid.

Wherefore, defendant, having fully answered, asks to be dismissed with his costs.

J. F. ROONEY,
*Attorney for Defendant J. T. Faxon, Administrator, etc.*

STATE OF CALIFORNIA, }
*County of Tuolumne,* } *ss:*

J. T. Faxon, being duly sworn, deposes and says, that he 17 is the administrator of the estate of F. B. Rice, deceased, and one of the defendants in the above-entitled action, that he has heard read the foregoing answer, that he knows the contents thereof, that the same is true of his own knowledge except as to the matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

JOHN T. FAXON,
*Administrator of the Estate of F. B. Rice, Deceased.*

Subscribed and sworn to before me this 30th day of January, 1893.

J. F. ROONEY,
*Notary Public.*

Filed January 31, 1893.

D. M. ORTEGA, *Clerk.*

*Amendments to Complaint.*

(Title of Court and Cause.)

Now comes the plaintiff, and by leave of the court first had and obtained makes and files the following amendments to the complaint on file herein:

Immediately preceding the prayer of said complaint insert the following:

That on the 3rd day of November, 1892, defendant F. B.
18 Rice died intestate in the county of Tuolumne, State of California, being at the time of his death a resident of said county and State.

That thereafter on the 16th day of Nov., 1892, John T. Faxon was appointed the administrator of the estate of said F. B. Rice, deceased, and he thereupon duly qualified as such administrator and entered upon the discharge of his duties as such administrator.

That ever since he has been and now is the duly appointed, qualified and acting administrator of the estate of said F. B. Rice, deceased.

That on the 26th day of November, 1892, said administrator caused notice to the creditors of and all persons having claims against the said deceased to present their claims within four months from the first publication of said notice to said administrator, to be published in the "Union Democrat" a newspaper printed and published in the county of Tuolumne.

That thereafter, and on the 4th day of January, 1893, said plaintiff duly presented to said John T. Faxon, administrator of said estate, his verified claim for said sum of $10,000, due him on account of said gold and gold-bearing earth and rock taken from plaintiff's claim by defendants as aforesaid.

That thereafter and on the 4th day of January, 1893, the said John T. Faxon, administrator as aforesaid rejected said claim and the whole thereof.

19

I. M. KALLOCH AND
F. P. OTIS,
*Attorneys for Plaintiff.*

STATE OF CALIFORNIA, } ss:
*County of Tuolumne,* }

A. W. Stinchfield, being first duly sworn, deposes and says, that he is the plaintiff in the above-entitled action, that he has heard read the above and foregoing amendments to the complaint of plaintiff and knows the contents thereof; that the same is true of his own knowledge, except as to matters which are therein stated on his information and belief, and — to those matters he believes it to be true.

A. W. STINCHFIELD.

Subscribed and sworn to before me this 23rd day of January, 1893.

F. P. OTIS,
*Notary Public.*

Service of the within amendments to complaint and receipt of a copy thereof, hereby admitted this 27th day of January, 1893.

F. W. STREET AND
J. F. ROONEY,
*Attorneys for Defendants.*

Filed Jan. 27, 1893.

D. M. ORTEGA, *Clerk.*

## *Findings of Fact and Conclusions of Law.*

(Title of Court and Cause.)

20 This cause came regularly on for trial on Thursday, February 2, 1893, before the court, a jury having been waived by all parties. I. M. Kalloch and F. P. Otis appeared as counsel for the plaintiff, and F. W. Street and J. F. Rooney appeared as counsel for the defendants. Evidence, oral and documentary, was introduced, and on Friday, February 17th, 1893, after argument by the respective counsel, it was ordered that the cause be submitted to the court for decision upon points and authorities thereafter to be served and filed. Points and authorities of the respective counsel were thereafter served and filed, and the court having examined and duly considered all the testimony in the case, and having examined and duly considered the points and authorities of the respective counsel, and being fully advised in the premises, now finds the facts of the case to be as follows, to wit:

### *Findings of Fact.*

For about fourteen years immediately prior to the 17th day of January, 1886, the mining claim described in the complaint as the "Pine Tree" and the mining claim now known as the "Carrington," which lie side by side, were held and claimed by defendant Gillis as a single mining claim, known and designated as the "Carrington" or "Old Carrington" claim, at Jackass hill, in the county of Tuolumne.

21 The said "Carrington" or "Old Carrington" claim, as it was held and claimed by Gillis prior to said 17th day of January, 1886, consisted of a piece of ground about 750 feet in length by about 450 feet in width, and included within its exterior boundaries various quartz veins now known as the "Carrington," "Criss," "Rice," "Ray," "Pine Tree," "Stoker" and "West." The course of these veins, excepting the West, was northwest and southeast and their dip into the earth was to the northeast. The course of the West vein was north and south and its dip into the earth was to the west. The West vein and the Rice vein in their descent into

the earth crossed each other and continued downward below the line of intersection. During all the time that the said piece of mining ground was in the possession of defendant Gillis, it was held by him as one mining claim, and was known and described by him and by everybody who had anything to do with or concerning it as the "Carrington" claim, or "Old Carrington" claim, and not otherwise.

In the spring of 1854, T. E. Carrington, Elizabeth G. Carrington, A. P. Carrington, E. G. Tyree, T. K. Tyree and T. Bookshire posted three notices on the Carrington vein, which notices contained the names of said parties and announced their claim to 1,000 feet along said Carrington vein and 100 feet on each side of said vein.
22 A. P. Carrington afterwards died, and in 1855 or 1856 the
two Tyrees and Bookshire sold their interests to T. E. Carrington. Thereafter T. E. Carrington posted notices on said vein claiming 1,000 feet along the same in the name of "Carrington & Co." The said 1,000 feet included that portion of the Carrington vein now held by defendant Gillis in the present Carrington claim. T. E. Carrington remained in possession of the Carrington claim until July, 1870.

In 1859 or 1860, T. E. Carrington posted three notices on the Pine Tree vein, claiming 300 feet along said vein. It does not appear how much if any ground was claimed alongside the vein. The 300 feet claimed were on the ground now embraced within the limits of the Pine Tree mine described in the complaint. Carrington remained in possession of the portion of the vein claimed until July, 1870.

In July, 1870, T. E. Carrington moved away and left his mining ground in charge of one Richard Stoker, who had lived on Jackass hill since 1858, instructing Stoker to do the assessment-work. Carrington did not tell Stoker that there was a "Pine Tree" mine, or "Pine Tree" claim, or "Pine Tree" location. Stoker took possession of the ground in which the Carrington and Pine Tree veins lay, and held it as one claim until June, 1872. During that time—from July, 1870, to June, 1872—there was no claims nor any
23 location known as the "Pine Tree." Stoker did not know of
any such claim or location. All the ground now known as the "Carrington" and "Pine Tree" mines was then held and known as the "Carrington claim," and such assessment-work as was done was done upon said ground as and for the "Carrington claim."

In June, 1872, T. E. Carrington sold and conveyed the Carrington claim by deed to the defendant J. N. Gillis. Upon representations made by Gillis that he had bought the claim, Stoker turned over to Gillis the possession of the ground he had been holding as the Carrington claim. Gillis then took possession of said ground and held the same as the Carrington claim and not otherwise until the date of his transfer of a portion thereof to plaintiff in January, 1886. The deed from Carrington to Gillis did not mention any vein or location or claim or property by the designation, "Pine Tree." In said deed the Carrington claim was described as "the whole of (being 1,000 feet) the Carrington."

From 1870 until the sale by Gillis to plaintiff in 1886, all the ground comprising the present Carrington and Pine Tree mines was known as the Carrington claim, and was held by Gillis as the Carrington claim, and no Pine Tree mine or claim existed. In
1876 the defendant Gillis showed plaintiff the boundaries of
24 the Carrington claim, as purchased by Gillis from Carring-
ton, and the ground afterwards sold to plaintiff was included within those boundaries as shown to plaintiff in 1876. At the time of the sale to plaintiff in 1886 the defendant Gillis told plaintiff and the plaintiff believed that the ground conveyed to him was a part of the Carrington claim. Gillis represented to plaintiff that the ground which he, Gillis, conveyed to plaintiff (which is the same ground described in the complaint) was a part of the Carrington claim which he, Gillis, had bought from Carrington in 1872.

In the year 1876 plaintiff Stinchfield obtained permission from defendant Gillis to prospect and mine on the Old Carrington claim, and did thereafter work and mine on said claim, and especially on the "West" and "Pine Tree" veins, until January, 1886. In January, 1886, for a pecuniary consideration of $600, defendant Gillis sold to plaintiff a portion of the said ground held by him as the Carrington claim, said portion being the northeasterly side, and extending the entire length of the claim, and being in area about one-third of the whole claim. Before the deed from defendant Gillis to plaintiff was made, they together went upon the ground and marked off and agreed upon the portion of the claim to be sold to plaintiff.
They together established visible monuments at each of the
25 four corners of the portion to be sold, and together established
and agreed upon the dividing line between the portion to be sold to plaintiff and the portion to be retained by defendant Gillis, and together established and agreed upon visible and permanent monuments marking said dividing line. On January 17th, 1886, the defendant Gillis made, executed and delivered to plaintiff a deed of grant, bargain and sale of and to the ground sold to plaintiff, and said ground so conveyed to plaintiff was in said deed designated and described as the "Pine Tree mine," for the purpose of distinguishing it from the remaining part of the Old Carrington claim retained by Gillis. The apex of the Rice vein was and is within that part of the Old Carrington claim retained by Gillis. The apex of the West vein was and is within the portion of the Old Carrington *ton* claim sold to plaintiff. The line of intersection of the Rice vein and the West vein was and is within the portion sold to plaintiff. The portion of the Old Carrington claim marked off and sold to and conveyed to plaintiff by Gillis was and is the same ground described in the complaint and now known as the Pine Tree mine. The monuments and lines established and agreed upon by defendant Gillis and plaintiff have remained undisturbed to the present time.

In the month of May, 1885, the defendant Gillis gave to one F.
B. Rice a verbal lease to work and mine on any part of the
26 Old Carrington claim, reserving for himself as his rental or
share one-fourth of all the gold which the said Rice might find. The said Rice thereafter and prior to January, 1886, sunk on

said Rice vein an incline or shaft about thirty feet in depth and described in this action as "Rice incline No. 1," and erected over said incline or shaft a platform and uprights and windlass, at a total cost of about $200 No gold excepting a "prospect" was found during this work, and the said Rice had quit work in said incline or shaft, and had removed therefrom the said uprights and windlass some time prior to January 17th, 1886. At the time the ground sold by defendant Gillis to plaintiff was marked off by them, and its corners and lines were established, the said Rice appeared on the ground and inquired who was going to pay him for his labor in sinking said incline or shaft and objected to having said incline or shaft included in the ground to be conveyed to plaintiff; and the dividing line between the ground sold to plaintiff and the portion reserved by Gillis was then established and agreed upon by defendant Gillis and plaintiff in the presence of Rice and with the consent of Rice at an oak tree about 26 feet easterly or northeasterly from the mouth of said Rice incline No. 1. No further work was
done by said Rice in said Rice incline or shaft nor on said
27 Rice vein until the month of December, 1887, nearly two years
after the purchase by plaintiff of the ground described in the
complaint.

After executing the deed of January 17th, 1886, to plaintiff, the defendant Gillis located in his own name that portion of the Old Carrington ground which was not included in his said transfer to plaintiff. The location was made on January 18th, by posting a notice of location on the northerly end of the ground, and a notice of location on the southerly end thereof, and by means of stakes in stone mounds placed at each of the four corners marking the location of said claim so that its boundaries could be readily traced; and on the 19th day of January, 1886, Gillis caused a copy of his said notice of location to be recorded in the mining records of Tuolumne county, said notice of location as recorded being in words and figures as follows:

"The undersigned has this day, Jan. 18th, relocated the Carrington mine, situated upon Jackass hill and bounded as follows: Running 262 feet northwest from the northeast corner of the Pine Tree mine to the northeast corner of the Santissimo mine, thence southeasterly 750 feet to a stone mound, thence easterly to the southwesterly corner of the Pine Tree mine, thence 750 feet to the place of beginning, the said mine being known as the "Carrington" mine
and bounded on the north by the Atlas mine, and on the
28 west by the Santissimo mine and on the east by the Pine
Tree mine.

JAMES GILLIS."

The Pine Tree mine mentioned in the foregoing notice was and is the same ground conveyed by Gillis to plaintiff and described in the complaint; and the easterly boundary line of the ground described in said notice as the "Carrington" mine, was and is the same line which Gillis and plaintiff established and agreed upon as the westerly boundary line of the ground conveyed by Gillis to plaintiff, and was and is the same line which Gillis and plaintiff established and agreed upon as marked by an oak tree 26 feet easterly or northeasterly from the mouth of the Rice incline No. 1.

On January 20th, 1886, the plaintiff formerly located the ground which he had purchased from defendant Gillis by posting a notice of location at the northerly end and a notice at the southerly end thereof, and by means of stakes in stone mounds placed at each of the four corners marking the location of the claim, so that its boundaries could be readily traced; and on the 21st day of January, 1886, plaintiff caused a copy of his said notice of location to be recorded in the mining records of Tuolumne county, said notice of location as recorded being in words and figures as follows:

29 "Notice.—The undersigned claims 759 feet in length of that certain lead or lode situate on Jackass hill, in Tuolumne county, Cal., commencing at this notice, posted on a stake in stone mound, thence running in a southwesterly direction, 66 feet to a stone mound, thence in a northwesterly direction 750 feet to a stake in a stone mound. Thence N. easterly 61 feet to a stake in stone mound in which a similar notice is posted. Thence in a northeasterly direction 121 feet to a stake in a stone mound; thence in a southwesterly direction 750 feet to a stake in stone mound, thence in a southwesterly direction 130 feet to the place of beginning, known as the Pine Tree mine

"Located, Jan. 20th, 1886.

"A. W. STINCHFIELD, *Locator.*

"Attest:

"JOHN GILLAM.
"J. R. STOKER."

The mining claim described in the foregoing notice is the same ground described in plaintiff's complaint, and is the same ground described in the deed of January 17th, 1886, from Gillis to plaintiff.

In the month of December, 1887, the said F. B. Rice and defendant Voss applied to defendant Gillis for permission to work and mine in said Rice incline or shaft No. 1 which had been sunk by Rice in 1885, and on the Rice vein. The said Gillis thereupon gave to Rice and Voss a verbal lease to work and mine on said
30 Rice vein, reserving for himself as his rental or share one-fourth of all the gold which the said Rice and Voss might find. Thereafter the said Rice and Voss commenced work in said incline or shaft and sunk down on said Rice vein and into the ground conveyed by Gillis to plaintiff, and described in the complaint, until they reached the line of intersection of said Rice vein with the West vein, and then drifted or followed along the line of intersection of said veins in plaintiff's said ground, and excavated and removed from plaintiff's said ground a plane section of said West vein from 60 to 70 feet in length and from 10 to 20 feet in width, and wilfully and knowingly, and without plaintiff's knowledge or consent, and against his will, took out and removed from said line of intersection in plaintiff's said ground, and from said West vein in plaintiff's said ground, and appropriated to their own

use, between the first day of February, 1888, and the 30th day of September, 1888, gold and gold-bearing earth and rock of the value of more than ten thousand dollars. The said gold and gold-bearing earth and rock was taken from the mining claim described in the complaint.

After securing his deed from defendant Gillis in January, 1886, the plaintiff worked continuously on the ground purchased by him and described in the complaint, until July, 1888. During
31 that time the plaintiff sunk a shaft about 80 feet in depth on the West vein, and about the middle of July, 1888, the plaintiff's works and the defendants' works came together in plaintiff's said ground, and plaintiff then knew for the first time that the defendants had taken out the line of intersection of the Rice and West vein and had taken out portions of the West vein, and plaintiff then knew for the first time that defendant had taken gold and gold-bearing earth and rock from the ground described in the complaint. After the defendants commenced work on the Rice vein in December, 1887, the plaintiff on several occasions warned them not to interfere with the West vein, and on several occasions asked to be allowed to inspect the works of defendants, but the defendants at all times declined to allow and never did allow plaintiff to enter their works at all until the said works of plaintiff and defendants came together in July, 1888.

At the time of the purchase by plaintiff from Gillis of the mining ground described in the complaint no work was being done on the old Carrington claim or any portion thereof, and the plaintiff did not know and had no means of knowing what agreement or arrangement had been made between defendants Gillis and Rice regarding said claim or any portion thereof, and did not know and had no means of knowing that Gillis had made a verbal
32 lease to Rice of the Carrington claim or any part thereof.

At the time the said works came together the plaintiff and defendants, with their respective workmen, made measurements upon the surface and in their respective inclines, drifts and excavations, and the plaintiff moved back in his excavation or drift a distance of about 12 feet from the Rice vein, where a barrier or bulkhead was erected, and it was then and there agreed by and between the plaintiff and defendant Rice that such bulkhead should constitute a dividing line beneath the surface of their respective works.

The defendants J. N. Gillis, F. B. Rice and J. N. Voss were at all times jointly engaged and interested in the removal of said gold and gold-bearing earth and rock from plaintiff's ground, and the same to the value of more than ten thousand dollars was by them appropriated to their joint use and benefit. By the said removal and appropriation of said gold and gold-bearing earth and rock from plaintiff's mining claim described in the complaint, the plaintiff has sustained loss and damage in the sum of ten thousand dollars.

Since the commencement of this action and since the former trial thereof the said defendant F. B. Rice died. One J. T. Faxon there-

after became the duly appointed and qualified administrator
33 of his estate. The said J. T. Faxon, as such administrator
was thereafter duly substituted as defendant in the place of
F. B. Rice, deceased.

On the 4th day of January, 1893, a claim against the said F. B. Rice for ten thousand dollars damages on account of the hereinbefore-found removal of gold and gold-bearing earth and rock from plaintiff's mining claim, being the amount sued for in this action, was within the time provided by law duly presented to the administrator of the estate of F. B. Rice, deceased. Said claim was duly verified as required by law, and has never been allowed, either in whole or in part, by said administrator, and was on said 4th day of January, 1893, by said administrator wholly rejected.

From the foregoing findings of fact the court draws the following:

## *Conclusions of Law.*

The plaintiff at all times since the 17th day of January, 1886, was the owner of the mining ground described in the complaint, and as against the defendants he was the owner of every vein and every part of every vein throughout its depth, which had its apex within the surface boundaries of said ground, subject to the provisions of the
following section of the Revised Statutes of the United States:
34 "SEC. 2336. Where two or more veins intersect or cross
each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine; and, where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

The defendants are jointly and severally liable to plaintiff for damages in the sum of ten thousand dollars.

The plaintiff is entitled to judgment against the defendants, jointly and severally, for the sum of ten thousand dollars and the costs of this action.

Dated June 21st, 1893.

G. W. NICOL,
*Judge of the Superior Court of Tuolumne County.*

Filed June 21, 1893.

D. M. ORTEGA, *Clerk.*

## *Judgment.*

(Title of Court and Cause.)

This cause having come regularly on for trial on February
35 2d, 1893, before the court, a jury having been waived by all
the parties; the parties appearing in person and by their
respective counsel; evidence, oral and documentary, having been

introduced, the arguments of counsel having been heard, written points and authorities having been served and filed by respective counsel, and the cause having been submitted to the court for decision; the court having examined and duly considered all the testimony in the case, and having listened to the arguments of counsel, and having examined and duly considered the points and authorities of counsel, and having heretofore signed and filed findings of fact and conclusions of law in due form, and being now fully advised in the premises; it is now ordered and adjudged that the plaintiff A. W. Stinchfield have and he hereby has judgment in his favor and against the defendants J. N. Gillis, J. N. Voss, and J. T. Faxon as administrator of the estate of F. B. Rice, deceased, jointly and severally, for the sum of ten thousand dollars and the costs of this action, taxed and allowed at $897.60, the said judgment against J. T. Faxon to be paid by him in due course of his administration of said estate.

It is further ordered and adjudged that the payment of this judgment by any of the defendants shall be a satisfaction of said judgment as to all of the defendants, and that the plaintiff shall 36 not by execution or otherwise collect under or by virtue of this judgment any more than the aforesaid sum of ten thousand dollars, with accruing interest, and the costs of this suit and accruing costs, $897.60.

Dated, June 21st, 1893.

G. W. NICOL,
*Judge of the Superior Court of Tuolumne County.*

Filed June 21st, 1893.

D. M. ORTEGA, *Clerk.*

### *Statement on Motion for New Trial.*

(Title of Court and Cause.)

This cause came regularly on for trial on the 23rd day of January, 1893, I. M. Kalloch and F. P. Otis, Esqrs., appearing as attorneys for plaintiff, and F. W. Street and J. F. Rooney, Esqrs., appearing as attorneys for the defendants. A jury having been waived by the respective parties the case was tried by the court without a jury, and at the trial the following proceedings were had:

A. W. STINCHFIELD, called in his own behalf, testified as follows:

I am the plaintiff in this action. I have lived near Tuttletown in Tuolumne county for a little over 18 years. I have lived at 37 Jackass hill since 1876. Since 1876 I have been engaged in quartz mining at Jackass hill, and since that time I have been familiar with the mines in that vicinity. I have worked on the Carrington, the Wilson & Means, and on the Chilano mines. I have known the defendant James N. Gillis since 1875. I commenced work at Jackass hill in the spring of 1876 under a verbal lease from Mr.

Gillis, upon the Carrington, Wilson & Means and Chilano. He said I could work on any of his claims there. I worked on the Carrington from 1876 till 1886, at that time I bought a portion of the Carrington from Mr. Gillis. I worked there under a verbal lease from Mr. Gillis from 1876 to 1886. I bought a portion of the Carrington from Mr. Gillis January 17th, 1886.

Mr. Kalloch: Did you get a deed from Mr. Gillis at that time for a portion of the Carrington you bought?

A. Yes, sir.

Q. Will you examine the document I now show you and see if it is the deed Mr. Gillis gave you at that time and to which you have referred to in your testimony?

A. Yes, that is the same deed.

Mr. Kalloch: We offer in evidence a deed from James N. Gillis to Warren Stinchfield, dated January 17th, 1886, and recorded
January 18th, 1886, in Book A, vol. 22, page 568 of Deeds,
38 Tuolumne county records, purporting to be a conveyance
of the premises described in the complaint in this action.

Deed received and read in evidence, marked Plaintiff's Exhibit "A," and is in the words and figures as follows:

This indenture, made this 17th day of January, A. D. 1886, between James Gillis of the county of Tuolumne, State of California the party of the first part and Warren Stinchfield of the same place the party of the second part, witnesseth: That the party of the first part for and in consideration of the sum of six hundred (600) dollars gold coin of the United States to him in hand paid the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and conveyed unto said party of the second part his heirs and assigns forever all that certain quartz claim vein, lead or lode situate in the county of Tuolumne, State of California and more particularly described as follows: Being situate on Jackass hill about one mile from the town of Tuttletown and commencing at a monument of stone marking the southwest corner of the Atlas mine, thence running one hundred and seventy-one (171) feet in a northwesterly direction to a stake in monument of stone, thence
running in a southeasterly direction seven hundred and fifty
39 (750) feet more or less to a stake in stone mound, thence east-
erly 171 feet to a tree blazed on two sides with stones around it, thence northwest seven hundred and fifty feet more or less to the place of beginning. Being that certain quartz claim known as the Pine Tree mine, and bounded on the north & east by the Atlas & Wilson and Means mines, on the west by the Carrington mine and on the south by the Chilano mine. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining. To have and to hold all and singular said described premises unto said party of the second part his heirs and assigns forever.

In witness whereof said party of the first part has hereunto set his hand and seal the day and year first above written.

JAMES N. GILLIS. [SEAL.]

STATE OF CALIFORNIA, } *ss:*
*County of Tuolumne,* }

On this 17th day of January, 1885, before me, F. P. Otis, a notary public in and for the county of Tuolumne, personally appeared James Gillis, known to me to be the party described in and who duly acknowledged to me that he executed the same. In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

[SEAL.] F. P. OTIS,
*Notary Public.*

40 Recorded at the request of W. Stinchfield, Jan'y 18th, 1886.

Q. Will you state Mr. Stinchfield if at the time you bought the property described in the deed from Mr. Gillis you and Mr. Gillis established the corners by visible monuments to that property?

A. We did, we established the corners of the ground. We marked three of the corners with stakes and stone mounds and a tree blazed on two sides with stones around it. The corner monuments have remained intact from that day to the present time.

Q. Were or were not those corners as so marked, agreed upon by you as the corners of the ground, conveyed to you by Mr. Gillis at that time?

Objected to, on the ground that the deed calls for a specific piece of ground, there is nothing in the deed that requires explaining, the deed is clear.

Objection overruled. Exception noted. Exception 1.

A. They were. After I bought the property I had a survey made
of it. I believe in 1890 it was Mr. McTarnahan surveyed it for me.
I was present at the time of that survey. Mr. Gillis was also
41 present. Mr. Gillis and I showed Mr. McTarnahan the corners and boundaries of the claim as established and agreed
upon by us. I afterwards had Mr. McTarnahan make a plat of that survey, and of the underground workings of the mines in that vicinity.

Mr. KALLOCH: I now show you a plat made by Mr. McTarnahan on a survey June 8th, 1890, and ask you if that is the plat to which you refer?

A. Yes, it is the same one.

(NOTE.—This is the plate used at the former trial of the case.)

There are four quartz veins that I know of on the property I bought from Gillis, that have been developed to some extent. They are known as the Ray vein, Pine Tree vein, Stoker and West veins, known as Stinchfield's veins. The strike or course of the West vein is north and south and it dips west. I have known that vein since 1881. I have worked upon it for about twelve years. It is a part of the property that I worked upon under a verbal lease from Gillis up to the time I bought from Gillis. There was no one working on the property I bought from Gillis at the time I bought except myself alone. After I bought from Gillis I continued to sink on the West vein, and took out gold and quartz. I think the deepest incline sunk on the West vein is about 80 feet.

Q. Did you get any gold from that vein while you were working upon it?

42 Objected to on the ground that it is immaterial and irrelevant.

The COURT: What is the purpose?

Mr. KALLOCH: For the purpose of showing at the time he met Rice and Gillis in his works, he was taking gold from his works.

The COURT: It is preliminary?

Mr. KALLOCH: Yes.

The COURT: The objection is overruled.

Exception noted. Exception 2.

A. Yes, sir. I continued to sink the shaft upon the West vein up till July or August 1888. Henry Thompson and Fred. Thompson were working with me in July 1888. We were working in a southeasterly direction from the shaft I have mentioned. I was within the limits of my own ground at that time. I was about 25 feet from the southeasterly line of my ground at that time. We then, about the middle of July 1888, broke into the works of Mr. Rice and Mr. Voss and Willie Swearer. Mr. Voss is one of the defendants in this action. Mr. Rice, now deceased, was a defendant at the former trial of this action. They were working on my West vein, drifting towards us. Of that vein they had removed 10 to 20 feet in width and 60 or 70 feet in length along the vein. When I say 10 or 20 feet in width I mean on the dip of the vein.

43 Q. Did you ever hear Mr. Rice say how much gold they took out from these works which were within your ground and within the limits of your ground described in the complaint?

Mr. STREET: I object to this witness testifying further in this case under section 1880 subdivision 3. Mr. Faxon, one of the defendants, is administrator of the estate of F. B. Rice, deceased, a former defendant in this case, and they have presented their claim against said estate, which has been rejected, and therefore he cannot testify against the executor of this estate.

The COURT: I will overrule the objection and admit the evidence, the court reserving the right to hereafter strike out the evidence as to all the defendants or as to either one of them.

Exception noted. Exception 3.

A. Yes. He said he took out $15,800. They never paid me any portion of it. They never had my consent to work any portion of the ground described in the complaint. I never in any way agreed to let them work there. I never consented to their working there. I knew which way they were sinking, I didn't know when they passed the line or where they were working until I met them. That was the first time I knew where they were working, only what I had heard. They would not allow me to go into their diggings. I

West n't know when they passed the line, nor where they were
44 of working till I met them in July 1888, the Thompson boys and I. I had applied for permission to Gillis and Rice to enter their works prior to that time. I wanted to know what ground they were working on whether on my ground or Gillis'. I asked them several times if I might go down and see where they were working. I did this in January 1888, they were then working in the Rice incline No. 1. That was the first time I saw any one working there after I bought the ground from Gillis. After I bought the ground from Gillis up to January 1888 there was no work done in there that I know of. I was denied admission into the works of Gillis and Rice. I was told I could not go down their diggings. When I met Rice in his works I was working upon the West vein with the Thompson boys. We had been taking out gold from that vein immediately prior to our meeting Gillis, Rice and Voss. We had taken out some $1,200 or $1,500 from the West vein, distributed along for a distance of about 12 or 14 feet from the point of meeting. We were taking out gold when we met them. Henry and Fred. Thompson were with me when we took out this gold. Neither Rice, Gillis or Voss ever showed me where in my claim they had taken out this gold. I never saw them show to any one else where they got the gold they took out. I was not working on any other vein but the West vein in January 1888.

45 Mr. STREET: I now move to strike out the testimony of the witness on the ground to which objection was made, that the witness is precluded from testifying under section 1880, subdivision 3.

The COURT: I deny the motion, reserving the right to strike out the testimony of the witness as to all the defendants or either of them if I should be hereafter so advised.

Cross-examination:

Since 1876 I have worked on the Carrington, Chilano and Wilson & Means mines at Jackass hill. On the Carrington claim I worked on the vein called the Carrington vein. Also on the vein north of it, the Rice vein, that was in about '77 or '78. The course of the Rice vein is northwest and southeast and its dip is about northeast. I worked in the same hole at the surface where afterwards Rice worked. I also worked upon the Carrington claim about 100 feet further to the southeast, upon an easterly pitching vein, to the west of the Rice vein. I also worked upon the Carrington ground upon the Pine Tree vein, the West vein and the Stoker vein and the vein I call the Ray vein. I was familiar with the boundaries of the Carrington mine in '76 and '77.

Q. What was there upon the surface at that time to indicate the boundaries of that claim? That is prior to your purchase?

46 A. Well, it was pointed out to me as the corner between the Atlas and the Carrington, a pile of rocks, and then between the Carrington and the Santissimo. The Santissimo is a claim that lies to the west of the Carrington.

except my-

Q. Where is the pile of rock of which you speak, how on the. the Santissimo claim?

A. Well, it is between the Carrington and Atlas. I don't know what the distance is, I am talking about the original Carrington. The monument I am talking about is one of the corners of the Atlas mine. I came to California in December, 1874. I first saw Gillis about working on this ground in the spring of 1876. He was working on the Chilano claim at that time. I don't remember exactly.

Q. You bought no further ground from Mr. Gillis than that described in the deed shown you?

A. Only one claim. And that is the claim described in the deed.

Mr. STREET: This deed, may it please the court, has not been read, I will now read it with the permission of the court.

(Counsel reads deed from Gillis to Stinchfield.)

Q. These mines which you testified to the Carrington, Chilano and Wilson & Means are the same mines mentioned in this deed to which you have testified, are they?

47 A. Yes, sir, I was in possession of this ground prior to the time Gillis gave me the deed under a verbal lease from Gillis. He said if I only got a small pocket he didn't want anything. If I got a large pocket he wanted me to take out wages and expenses and give him a quarter. At the time I got the deed I was working on the west vein. Prior to that time I had worked on the Ray, the Pine Tree and the Stoker veins. The Pine Tree and the West vein intersect. The course of the Pine Tree vein is northwest and southeast, it dips to the northeast. The course of the West vein is north and south and it dips to the west. The Ray vein is west of the Pine Tree vein, about 20 feet, its course is northwest and southeast and it dips to the northeast. The Stoker vein is northeast of the Pine Tree vein, its course is northwest and southeast and dips to the northeast. Upon this ground there are three veins dipping to the northeast and one dipping to the west. I had sunk about 25 or 30 feet on the West vein prior to my purchase from Gillis. The shaft which I sunk about 80 feet in depth was 12 or 15 feet south of the shaft I had sunk prior to the purchase. I commenced the 80-foot shaft in the spring of '86. I worked continuously from that time till '88. I worked there and in other places, I did not put in all the time in that incline. The first drift ran from that shaft was about 60 feet from the surface. We drifted along the line of the
48 intersection of the West vein and the Pine Tree and the Ray veins. The Ray vein is about 20 feet west of the Pine Tree vein. We struck a belt of mineral slate to the west of the Ray vein and we followed along the slate on the West vein. This mineral slate is 4 or 5 feet from the Ray vein. It is about 55 or 60 feet from the top of our incline down to this slate. There are several belts of mineral slate there. These belts of mineral slate run to the surface. The second belt of mineral slate west of the Ray vein is 6 or 7 feet from the other. Our incline did not extend beyond this second belt of slate. I drifted along the first belt of slate on the

West vein and our works met. Rice was working on the same belt of slate. He had another belt of slate that lay further west still. In his works I saw the Rice vein and the West vein. He had worked along the line of the intersection of the Rice vein and West vein, and still wider, from 10 to 20 feet in width.

Q. How many veins did you observe in that excavation pitching t the east?

.on A. Two, I think they both can be called veins, I would call the A. vein the only one, but there is a little thread there extending Q. way up the Rice incline. Lying above what we call the Rice work 3 or 4 feet.

The COURT: These you call veins?

49 A. Yes, both can be called veins. They had excavated the West vein in places 7 or 8 feet above this upper vein.

Q. At what particular place in the works did you ever measure it to tell where the excavation on the West vein extended 7 or 8 feet above this upper vein of which you have spoken?

A. At the foot of the Rice incline. I made that measurement in 1890. I afterwards had the surveyor make the measurements.

At the time we broke through, Rice, Voss and William Swearer were there. At that time I did not make any measurements to ascertain whether they were within the ground described in the complaint. I knew he was on my ground because he had my vein, and was working on my west vein inside the side lines of my ground.

Q. How did you know that beneath the surfrce?

A. Well, I had measured the incline and measured the distance across the drift and so on.

Q. When had you made those measurements?

A. Well, any time I felt like it, felt like measuring, generally to see how far we were drifting. This 80-foot incline which I sunk was west of the center of the ground I had purchased from Gillis. My claim is 177 feet in width and 750 feet in length. The mouth of my incline was a little west from the center of my claim. The angle of my incline is about 45. At the time I bought this
50 ground from Gillis I was acquainted with F. B. Rice and with Voss.

Q. Where were they working at the time you made this purchase?

A. I do not remember——

Objected to on the ground not in cross-examination. And upon the further ground that it is immaterial and incompetent, unless limited within the time succeeding the execution of the deed from Gillis to Stinchfield.

Objection sustained as not cross-examination.

Exception noted. Exception No. 4.

In January, 1888, Rice and Voss were working somewhere in the Rice incline No. 1. I do not know which side of the line; they would not allow me down, I could not tell. I think I first saw them there about the 9th of January, 1888. I first saw Rice work-there in '85; he was working near the surface. The first time I saw

Rice working there after I purchased the ground, was in January, 1888. When I first saw Rice and Voss working in the Rice incline in January, 1888, I saw Gillis that day and talked with him about it. I told him that I saw Rice and Voss working there and I thought they were working towards my ground, and if *that* they continued on down they might strike my west vein, and I had bought the
51 ground from him, and I didn't want him to allow anybod[illegible]
to work across the line,* that was the understanding whe[illegible] bought the ground. He said We think we have got a right to fol[illegible] the vein down which crops outside of the lines. Rice and V[illegible] were somewhere in the incline, I was not down, they wouldn't al[illegible] me to go down. They refused to let me go down every time I asked permission. On this day in January Voss was tending the windlass.

Q. Rice was on the surface when you made this request, was he?

A. No, he was down a little ways. I spoke to him while he was down a little ways in the incline. Voss was at the windlass. I don't know whether Voss heard what I said to Rice or not. I was on the windlass platform with Voss. Rice told me I could not go down, to go and see Gillis about it. I could see from where I stood to the bottom of the incline. I should think their incline was down at that time 20 or 30 feet. I spoke to Rice and Voss again a few days after that. Gillis also came along and I told them I did not want them to take out my west vein or work under the surface. That if they continued to sink the way they were going they would strike my west vein, and Mr. Gillis says, We claim the right to follow down on this east vein, and if we strike anything that belongs to you you shall have it, and Mr. Rice says, Yes.
52 Mr. Gillis says, You shall not be swindled out of anything.
They did not keep the mouth of their incline closed that I know of, I think I heard that they had it nailed up at one time. They would not allow me to go down when I asked to, and I did not go down to see any other time. When I talked with Voss he said he was working there according to law and thought I had no right to go down. I was then working on the west vein I was down on the west vein about 55 feet at that time I think. We did not break through into their works until July 1888. I had another talk with Rice about their works in March 1888. I again talked with Rice about their mining operations in June 1888. I told them I thought they were taking out my gold, and that there would be trouble about it. I told this to Voss. Voss said he did not care about the trouble he was going to work according to law. I also told Gillis in June 1888, that I thought they were taking out my gold, and that I did not want them to do so. He said he never sold me that vein and claimed he had a right to work that vein. That is the Rice vein where the Rice incline is.

Redirect examination:

The Carrington claim, prior to my purchase from Gillis, was bounded by the Wilson & Means and the Atlas on the north, Santissimo on the west and Chilano on the south.

53 Q. You have testified to the corners between the Atlas and Carrington as pointed out to you, who pointed them out to you?

A. Mr. Gillis at one time, and the corner between the Wilson & Means and Atlas was pointed out to me by William Waters. He was a miner that at one time owned the Atlas, he is now dead.

Q. Who told you, if any one, as to the boundaries of the Carrington mine as you have described them to counsel on the other side?

A. James N. Gillis, in 1876.

Q. On what ground did you say Mr. Gillis told you you could work, some ten years ago?

A. Carrington, Wilson & Means and Chilano. When I saw Rice working there in 1885 he was working near the surface. No one was working with him. I did not have any conversation with him about his work at that time. I did not know anything about the nature of the terms he was working under there. I supposed he was just prospecting there.

Q. What is the Carrington mine which bounds your claim on the west?

A. It is the balance of the Carrington claim which Mr. Gillis reserved at the time he gave me this deed.

Recross-examination:

54 Q. You say that a portion of the Carrington that bounds you upon the west is a portion of the Carrington mine reserved by Gillis, what do you mean by saying that the Carrington mine which bounds the Pine Tree mine upon the west is the portion reserved by Mr. Gillis.

A. Well, Mr. Gillis deeded me the northern portion, northeast portion of the Carrington mine, the original Carrington mine. He told me so at the time. We called it the Pine Tree mine to designate it from the Carrington. It had not been called the Pine Tree mine before that time to my knowledge. I had never heard it called the Pine Tree mine.

Q. How did you come to call it the Pine Tree mine then?

A. There used to be a large pine tree stood over the croppings of the Pine Tree vein. That pine tree was not standing there at the time I got the deed. I think it was felled in '77 or '78. We built our blacksmith shop right over where that pine tree stood. A shaft has been sunk right under where this pine tree stood.

Q. Was that the pine tree from which that claim derived its name, the Pine Tree mine?

A. Well, the boys used to ask me sometimes where I was working, if I was working near the pine tree, and I think that is how it come to be called—spoken of—relating to——

Q. Spoken of as what?

55 A. As the Pine Tree vein. I never heard it called the Pine Tree mine until Mr. Gillis and myself called it by that name. He told me it was the northern portion of the Carrington he was deeding to me. He says We will call it the "Pine Tree

mine" to distinguish it from the portion here reserved of the Carrington. He told that to me. That was the day he made the deed to me. The deed was drafted by Mr. Frank Nicol. Mr. Gillis and I gave him the description of the property. Mr. Gillis and I described the grounds, the boundaries as best we could, and Mr. Nicol wrote out the deed and we were both satisfied.

Q. Who told Mr. Nicol to describe that claim as the Pine Tree mine?

A. Well, I spoke to Mr. Gillis about it. I says, This is the northern portion of the Carrington, he says, Yes, but we will call it the Pine Tree mine, he says he would have to get his claim relocated that joined it, it would change the boundaries of his other claims and we would call it the Pine Tree claim. Some of this conversation was at the claim and some of it was at Mr. Nicol's office. The description given Mr. Nicol to insert in the deed was an oral one.

CARROLL MCTARNAHAN, called by plaintiff, testified as follows:

56 I am a surveyor, have been such surveyor for seven or eight years. I am at the present time county surveyor of Tuolumne county, and United States deputy mineral surveyor and licensed surveyor of the State of California. I am acquainted with the plaintiff and also Mr. Gillis, one of the defendants. I was also acquainted with Mr. Rice, one of the defendants. I made a survey of the Pine Tree and Carrington mines prior to the former trial of this action. That survey was made June 20th, 1890, for Mr. Stinchfield. Subsequently, I made a plat of the survey *of the survey* subsequently thereto. The plat shown me is the plat I made for the plaintiff, Mr. Stinchfield. I testified concerning this plat at the preceding trial of this case. Upon this plat are the boundaries and corners of the Pine Tree quartz mine and of the Carrington mine as shown me. Mr. Gillis showed me the corners of the Pine Tree mine and of the Carrington, Mr. Stinchfield was along, especially on the Pine Tree mine. The four corners of the Pine Tree mine as shown upon the plat are taken from my survey as shown me by Mr. Gillis and Mr. Stinchfield. The boundaries and corners of the Carrington as upon the map are as shown to me by Gillis. The red line running through the Pine Tree mine indicates the horizontal course of the West vein. This plat was made in July, 1890. The left side of the plat shows on a larger scale especially the underground works of these parties, and also the horizontal course

57 of the West vein, the inclines and different works there. When I made the survey the corners of the Pine Tree mine which were shown me were the northwest corner, and the northeast corner of the Pine Tree and the southwest corner of the Atlas mine.

Q. As shown on the plat?

A. Yes, sir.

Q. These corners were shown you by Mr. Gillis and Mr. Stinchfield?

A. Yes, sir.

The underground works are shown, the greater portion east and some west of the line designated on the plat as the southwest boundary of the Pine Tree mine. The underground works are colored purple and blue. The blue portion indicates where Stinchfield worked, as shown me by Stinchfield, Gillis and Rice. The point marked "junction of Rice and Stinchfield works" indicates the northern point to which Rice worked. The purple portion indicates Rice's works. The orange line indicates the point where the east vein and the west vein intersected. Rice and Stinchfield pointed out to me this line and it shows for itself. There is a hog's-back or elevation running through the works which indicates the line of the intersection of the veins. The portion in blue marked Stinchfield's north incline is the incline that Stinchfield ran
58 down on the West vein and intersected the Rice vein. The
incline is sunk on the West vein. On the lower portion of the map is represented a transverse or cross section. It shows the course or the intersection of these veins with the reefs of slate and the veins in these inclines. The map is correct from the survey I made, and according to the information I received from Rice, Gillis, Stinchfield and others.

Mr. KALLOCH: We offer this plat in evidence for the purpose of this case.

Mr. STREET: Before objecting, I desire to ask one or two questions.

Q. You say, Mr. McTarnahan, upon the left portion of this map you have indicated the Carrington and the Pine Tree quartz mines?

A. Yes, sir.

Q. Will you commence at the northeast corner of the Pine Tree mine and read what you have there as the boundaries of that claim?

A. The first course, beginning at the northeast corner of the Pine Tree quartz mine and the southwest corner of the Atlas mine, the first course is south 46 degrees and 20 minutes east 563.20 feet to a pine tree at the southeast corner of the Pine Tree mine, pine tree 20 inches in diameter; thence south 27 degrees and 49 minutes west 219.52 feet to the southwest corner of the Pine Tree mine
59 and southeast corner of the Carrington mine; thence north
35 degrees and 55 minutes west 778 feet to the northeast corner of the Carrington mine and the northwest corner of the Pine Tree mine, thence south 83 degrees and 6 minutes east 185.18 feet to the point of beginning. These are the boundaries of the Pine Tree mine.

Q. Mr. McTarnahan, for the purpose of getting at the property involved in this litigation I will read you the description of the Pine Tree mine as contained in the complaint (reads). "Being situate on Jackass hill, about one mile from the town of Tuttletown and commencing at a monument of stone, marking the southwest corner of the Atlas mine," I will ask you if you have anything there marking the southwest corner of the Atlas mine upon that plat?

A. Yes, sir, this would be the point. (Showing.)

Q. "Thence running 171 feet in a northwesterly direction to a stake in monument of stone," have you such a course as that?

A. I have, that would be northwesterly, yes, but a greater distance by about 14 feet. The description in the complaint is 14 feet shorter than the description upon the plat.

Q. "Thence running in a southeasterly direction 750 feet more or less to a stake in stone mound," what description have you there?

60 A. That would be southeasterly 778 feet, a greater call than contained in the complaint by 28 feet.

Q. "Thence easterly 171 feet to a tree blazed on two sides with stones around it," what is the call you have?

A. I have a northeasterly course there, 219.52 feet, a greater call than you have read to me by 48.52 feet. That is the pine tree I have designated there as blazed upon two sides. The two points as in the complaint the southwest corner of the Atlas mine and the pine tree blazed on two sides are placed upon this plat as shown to me. The Pine Tree mine as I have designated it upon this plat is 14 feet wider at the northerly end than the call in the complaint, and 28 feet longer upon the westerly side and 48.52 feet wider upon the southerly end than the call in the complaint. I have not described the property upon this plat exactly as it is described in the complaint.

Q. Now, this work you have marked in purple as being the place where Rice and Voss worked upon this claim, can you tell me what portion if any of that work would be upon the ground as described in the complaint?

A. Well, there would not be as much of the workings of Rice and Voss on that claim, that is to take the same portion as I have delineated and take the measurements in the complaint as is
61 shown on this plat.

Q. Then your plat of the underground workings and the amount that has been excavated within the side lines of the Pine Tree mine does not conform to the description in the complaint?

A. No, sir, as described in the complaint the dividing line between the Carrington claim and the Pine Tree mine as described in the complaint would lie a considerable distance to the east of where the line now is, following the same direction, same course; what I mean by that, the course at the northerly and southerly end of the Pine Tree mine.

Mr. STREET: We now object to the plat being offered in evidence upon the ground that it does not describe the mining claim concerning which this action is brought, the Pine Tree mine as delineated upon the map being greatly in excess of the ground described in the complaint.

Objection overruled.

Exception noted. Exception No. 5.

Plat received in evidence and marked Plaintiff's Exhibit B.

Mr. KALLOCH:

Q. You say to counsel upon the other side, commencing at the monument of stone marking the southwest corner of the Atlas mine, it is how many feet in a northwesterly direction to the stake and monument of stone marking the next corner?

62 A. It is 185.18 feet.

Q. Going thence south—southeasterly to the southwest corner of the claim, what is the total number of feet?

A. 778 feet.

Q. Running thence easterly to the southeast corner of the claim?

A. 219.52 feet.

Q. Running thence northwesterly to the point of commencement?

A. 563.20 feet.

Q. That is true—was the true distance between the monuments as given you—as shown you by Mr. Gillis and Mr. Stinchfield when you surveyed?

A. Yes, the points measured on the ground.

Mr. KALLOCH:

Q. Refer to your notes and state the length of the Stinchfield north incline, as it is shown upon the plat.

A. 74 feet would be the length of the Stinchfield north incline, that is on the angle of the incline down to the backbone or intersection of the West vein and the Rice vein. The depth of Rice incline No. 1 is 49 feet, 5 inches. That is from the surface to the point of the intersection of the veins. From the dot marked junction of Rice and Stinchfield works down to the dot at the foot
63 of the Stinchfield south or old Carrington incline is 42 feet, 2 inches. From the last-described point to the point marked, south end of Rice's prospect place, would be nearly 24 feet. The whole length of the excavation is about 67 feet and 2 inches. From the point marked junction of Rice and Stinchfield works, to the point marked north end of Stinchfield works the horizontal distance is 67 feet. The depth of the Pine Tree incline, on the incline, is 33 feet and 8 inches. The distance across the excavation and on the dip of the west vein across the northernly end of the purple-colored portion, which is just below the spot marked junction of Rice and Stinchfield works, would be about 15 feet at that point, across the entire opening, that is on the angle. That is the widest extent of the excavation at that point. The width across on the purple-colored portion where it is marked "clay seam" would be something like 20 feet. At a right angle with a line marked southwest boundary of the Pine Tree quartz mine to a point marked junction of Rice and Stinchfield's works the distance is 21 feet. At a right angle with the same boundary line to a point at the foot of Rice incline No. 1 the distance is about 8 feet and 8 inches. These distances are correct within an inch or two. The distance from the mouth of the Rice incline No 1 to the dividing line between the Carrington and Pine Tree mines, on the incline, would be about

39 feet. On the transverse section as shown on this plat the
64 distance from the mouth of Rice incline No. 1 to the dividing line between the claims is 36 feet, that is measured to the foot of the incline. Mr. Rice was on the premises at the time I made that survey. These points were shown me and these trees along here. I understood from what was said that these were about on the line. Mr. Rice was present with me all the time. I don't remember whether he said anything about it or not.

Cross-examination:

(The witness indicates with a pin point on the plat, a point on the northerly line of the Pine Tree mine 171 feet from the southwest corner of the Atlas mine, then a point which would be 171 feet on the southerly line of the claim, from the pine tree blazed on two sides, then draws the line in pencil through the portion of the map marked in purple representing the underground works of Rice.)

Q. Now, Mr. McTarnahan, by the application of your scale to that plat, from the line you have marked there as the westerly line of the Pine Tree mine will you tell the distance from that line at right angles, to the point marked clay seam and where that pencil line connects with the clay seam?

65 A. That would be about 19 feet, that is taking from the point near this live-oak tree, Rice's incline. As shown by the plat the actual amount of ground excavated by Rice, that would be within the ground described in this complaint, would be some 7 or 8 feet along the line of the intersection of the Rice and West vein-, and the greatest width of the excavation made by Rice and Voss within the ground described in the complaint would be about 8 feet horizontal, that portion would comprise all the ground that has been excavated by Rice and Voss within the ground described in the complaint.

The lines marked upon the plat in green are to represent veins dipping east, one the hanging, these veins in the intersection and two on the foot-wall of the intersection. The horizontal distance between the vein at the foot of the Rice incline No. 1 and the hanging-wall vein is, horizontally, about 6 feet. These same veins are indicated on the transverse section of the plat. The hanging-wall vein lies about five feet above the point of the intersection of the west vein and the Rice or middle vein, and the distance from the same point to the lower easterly pitching vein is about 5 and a half feet. The greatest width of excavation on the west vein lies at a point right opposite the point where Rice's incline intersects the vein, there the west vein has been taken out about 3 feet above the hanging-wall vein. At a point above the Rice incline and
66 south of that projection into the excavation, the excavation is 6 inches or a foot below the east-pitching vein. These veins that are marked in the excavation upon the plat are made from actual observation and measurements. The excavation except in two or three places is all within the hanging-wall vein and

the lowest vein found in the excavation. As a rule the excavation is about within these veins, just above and below that intersection of the Rice and West vein.

Redirect examination:

I know where the southwest corner of the Atlas mine is. If I was told to run a line from the southwest corner of the Atlas mine northwesterly I would go anywhere between north and west. 171 feet northwesterly would be to a point anywhere between north and west. To make such survey I would want the point. I would either want the point or the exact variation. To run a line southeasterly is to run anywhere between south and east.

Mr. OTIS: Then, Mr. McTarnahan, if you went to the southwest corner of the Atlas mine situated on Jackass hill in Tuolumne county and were told to make a survey from this, running thence 171 feet northwesterly, and from that point 750 feet southeasterly, and from that direction easterly 171 feet, and from that direction north-
67 westerly 750 feet, could you make such a survey?

A. No, sir; well, I could make the survey; I would not know anything about it.

Q. You would want the points to know where——

A. Yes, sir.

Q. On this map as represented here you could make that survey so as to bring the ground where Rice and Stinchfield's work met in here and the excavation you have indicated on this map, you could run that line so as to bring the line between these two points 50 feet west of where it is on here, could you not?

A. Well, I could float it at least six degrees further south.

Q. That excavation would be at least 50 feet west of the dividing line you have marked on the map?

A. I might float it maybe a hundred feet. I might float it further; yes, sir. If I was told to make a survey commencing at the southwest corner of the Atlas mine and run thence northwesterly 171 feet to a stake in a monument of stone I would run to the monument of stone whether it was 171 feet or any other feet. If I had the parties for whom I was making the survey, both the parties in dispute state that was the monument, that is the monument I would go to. Starting from there and running in a south-
68 easterly direction 750 feet to a stake in stone mound, I would
run to the next point they showed me. I did that in making the survey for this map. Thence from that easterly 171 feet to a tree blazed on two sides with stones around it. I run to the pine tree that was shown me as being the pine tree. That pine tree is a permanent monument, easily seen, blazed on two sides with stones around it. The southwest corner of the Atlas mine, that I started from is a visible monument. From this monument I ran 171 feet in a northwesterly direction, to a stake and monument of stone. I found a monument of stone there and in place of being 171 feet it was a little more. I found it in that direction. It was visible, plain to be seen. In running from that course in a southeasterly direction I found another stake and a monument of stone.

Q. If in making a survey under the description in the complaint described, as this land is described in the complaint, would you not make that survey exactly as you made it on this map?

A. Yes, I would if that was the only monument there was and the monuments were shown me, should do that I can't say that this map exactly describes the Pine Tree mine as described in the complaint. It describes it as near I think as any miner would
need to describe it in making this location. Taking these
69 points, in making a survey under that description in the
complaint, I could not survey anywhere else.

Q. Commencing at the southwest corner of the Atlas mine, thence running 171 feet in a northwesterly direction to a stake in a monument of stone?

A. Yes, sir.

Q. Thence running in a southeasterly direction 750 feet to a stake in stone mound?

A. Yes, sir.

Q. Thence easterly to a tree blazed on two sides with stones around it, thence northwesterly 750 feet to the place of beginning, with this description, these calls, you could not make a survey of that ground any different from what you have?

A. No, sir, these are the calls and points I would measure to. The monuments, these stakes and stone mounds down at these corners there, are visible although the distance is a little more. The east vein and west vein where they intersect in the excavation are about at right angles.

Mr. STREET: Is the southwest corner of the Atlas mine a fixed point?

A. Yes, that's a fixed point from the patent of the Atlas mine. It is not a movable point. The pine tree blazed on two sides is also a fixed point.

Q. Now, suppose you had gone upon this ground to make
70 a survey of this land as described in the complaint, having
those two fixed points, the southwest corner of the Atlas mine and the pine tree blazed on two sides, could you have made a diagram of that ground as described in the complaint with these two fixed points and made them connect?

A. Yes, I could have made them connect. I could have made the description very near to what it is in the complaint, according to my own satisfaction. Well, where I get my knowledge, I don't know what you have got the Government survey says, where fixed objects and monument are in conflict with courses and distances, the fixed objects and monuments must govern, and courses and distances must give way. I consider the southwest corner of the Atlas mine a fixed monument. I consider a pine tree blazed on two sides a fixed monument. Stakes in stone mounds are of course fixed monuments when you fix them.

A. G. McAllister, called by plaintiff, testified as follows:

My business is pocket-mining. I have been living at Jackass hill since 1889. I am acquainted with the defendant J. N. Gillis, and I also knew F. B. Rice in his lifetime. I also knew the defendant Voss. I know the Pine Tree mine. Have known it since 1889. I went to work on that mine in May, 1889.

71 Q. I now show you a plat of the mine that has been introduced in evidence and marked "Plaintiff's Exhibit B," were you down the Rice incline No. 1 that is designated on this map?

A. Yes, that's the incline Mr. Rice took myself and Mr. Graham down. We went right down the incline and turned to the left a few feet. That would be northerly towards Stinchfield's works. Angus Graham was with me at the time. Rice was showing me where he took out some money in the excavation there. From where we were standing to the left of the incline a few feet he pointed right out in front where he had taken out the heft of his gold. It would be along on this hog's-back. About on the space of intersection. He didn't point at any particular place, he said it was along there we got the bulk of our gold. He was standing with his back towards the incline and pointed out east and said it was along there where he got the bulk of his gold. We were probably 5 or 10 feet to the left of the mouth of the incline.

Cross-examination:

It was either the last part of April or the first of May 1889 that I was down this incline with Rice. That was the first time I had been down that incline. We did not follow the excavation
72 northerly as far as we could. What I call the hog's-back is a ridge there where the two veins have come together, a vein pitching from the east and a vein pitching from the west. That ridge forms an acute angle, come up to quite a sharp point. When we first went down the incline we went to the south and then followed up north. We went south to about where there is a hole going down called the Carrington hole. At that time it was either filled up or had not been broken through. We walked back along the hog's-back to the north. After we got down here below the incline, he pointed out in front of us along the hog's-back and said Here is where we got the bulk of our gold, Mr. Voss and him. Rice said Voss had a prospect running down behind this little pillar that lies in there, and that when he went to San Francisco he left Voss prospecting there. Rice said, I got my gold along the line of the hog's-back.

Q. He said to you, pointing, "I got my gold along the line of the hog's-back"?

A. Yes, here is where we got the bulk of our gold, I should think about ten or twelve feet as a person would stand——

Q. (Interrupting.) One moment, did he state to you any exact place, or simply say along the line of this hog's-back we got the gold?

A. Well, it would be confined within a space of twelve feet.

73 Q. I am asking what he said.

A. From the movement of his hand——

Q. (Interrupting.) Did he say anything to you about the distances upon the hog's-back?

A. He did not.

Q. He simply said along the line of the hog's-back, pointing with his hand, he got the gold?

A. Taking in about twelve feet.

Q. That's your opinion?

A. That his hand took in.

Q. He did not say about twelve feet?

A. No.

Q. What was the occasion of Rice taking you down there at that time?

A. He wanted to show me where he had done well, I suppose. He was that kind of a person, he liked to show people around, show his works and what he had been doing. He said, "Along this hog's-back is where we got the heft of our gold," pointing in front.

Q. Was Rice working there in '89?

A. I think he had been doing some prospecting around. I could not say he had worked there from my own knowledge. Rice at that time was living at Jackass hill. His house was about 300 or 400 yards northerly from the Pine Tree mine. I first made Rice's acquaintance in 1885. From that time to 1889 I was not in-
74 timately acquainted with him, although I had met him often
before. From '85 to '89 I was living at Tuttletown. On the day I went down his incline I met him between Gillis' house and Stinchfield's place. He asked me if I was prospecting. I told him that I had quit, and from this talk he asked me to go down his incline. We were down there an hour or more, I should think. It required lights down there. I don't know where Rice got the candles; I think we had lights. I don't know that no one had been working in that incline for about a year at the time I was there. No one was working in the incline at the time Rice and I was down the incline, but it looked as if somebody had been there very recently. That was the first time I had been to the mouth of the incline. The incline was all open; no portion of it was boarded up.

Redirect examination:

The WITNESS: When Rice told me where he had taken out his gold, we were standing on the left of the incline, that would be north of his incline, and he pointed out in front, and along there we took out the bulk of our gold.

Recross-examination:

Q. Was Mr. Voss working there at the time you were down the incline?

A. I don't think he was; he was not working there at that time.

75 Q. Now, you testified in this case when it was tried in 1890, you were a witness in that case then?

A. Yes, sir.

Q. And now you say you don't think Voss was working there at that time, when you were down there?

A. Yes, sir.

Mr. STREET: I will call your attention Mr. McAllister to a portion of your testimony as found in volume 1 of the Transcript of Testimony taken at the former trial of this case, Wednesday July 23rd, 1890, commencing at page 51 and embracing a portion of page 52 of that volumne of testimony. I will read you this portion of your testimony as taken down by the reporter at that time, (reads) "Do you know where the Rice incline is, going down to the Stinchfield ground? Ans. Yes, Mr. Rice took me down there I think a year ago this last May. Question. Took you down a year ago? Ans. Yes, sir. Question. Where was he working at that time? Ans. I think he was working with Voss there and he showed me where he had taken out gold. Question. Where did he show you that he had taken out gold? Ans. Just below the line of the incline, 4 or 5 feet below; I thought it a very likely looking place for gold. Question. The vein where they were working at the time?
76 Ans. I think Voss was working on the west vein, and I think Mr. Rice said he didn't think he would get any gold there. Question. What did he tell you at that time? Ans. Told me he didn't think Voss would get any gold there, he was working down below the intersection at that time. Question. That was at this place marked on this plat intersection of east and west veins was it not? Down at the bottom of Rice's incline? Ans. Yes, it was a little past the intersection, Mr. Rice's vein cuts across this west one here from the wall. Question. Cuts across through? Ans. Yes, the way he followed his vein down. Question. On which vein was Voss working? Ans. He was working on the west vein down towards where his vein come down."

Q. Do you remember testifying to that?

A. Yes, sir.

Q. Now, was that testimony true that you gave at that time, is that a correct statement of the matter?

A. Well, he was not working at this time when we were down there but Mr. Rice said he was working in on a prospect, in where this pillar had been left in there.

Q. Now, Mr. McAllister, I will call your attention to this last question and answer in which Mr. Kalloch asked you on which vein was Voss working, "He was working on the west vein down towards where his vein would come down."

77 A. That's where Rice said he went in on this prospect.

Q. Then when you testified at the former trial of this case that Voss was working on the west vein down towards where his vein would come down, were you testifying to facts within your knowledge?

A. Well, that is where Mr. Rice told me that he had worked in on this prospect.

Q. Then as a fact he was not working there in the mine at that time?

A. He was not working there when I went down there. I think his tools were there, I don't think he was down in the mine working.

Mr. STREET: When you testified in this case before and gave the testimony that I have read to you, did you then testify to what you then thought or knew to be the truth in the matter?

A. That was what I thought was the truth, sir.

Q. Then how does it come that at this time you testified prior to my asking you these questions in reference to these statements that Voss was not working there at that time?

A. He was not working at that particular time that I was down there.

78 Q. Well, then, when you stated at the former trial of this case that Voss was working on the west vein down towards where his vein would come down, were you stating that which was the truth of your own knowledge?

A. Yes, sir.

Q. Now, then, when you state at this present time that Voss was not working in the claim at that time, you were there, how do you reconcile your statement at this time with your statement made at the former trial of this case?

A. Well, that is what Mr. Rice told me, that he was working in that particular place, following a prospect down there.

Re-redirect examination:

Mr. KALLOCH: Referring to your testimony as given at the former trial of this case, you were asked, "Where was he at work then?" and you answered, "I think he was working with Voss there, and he showed me where he had taken out some gold," do you mean to testify in giving that answer that Rice and Voss were working there together on that day, when Rice took you down?

A. I do not think they were working together there that day, because Voss, I do not remember of him being there. I do not mean that he was right present there with us that day; he was a partner there and that was where they were working.

79 Mr. KALLOCH: We offer the testimony of this witness given on the 23rd day of July, on Wednesday, 1890, at the former trial of this case in his examination-in-chief, on the part of the plaintiff, and being in questions and answers as follows: Commence at page 51, volume 1, of record of that testimony. (Reads:) Question. Do you know where the Rice incline is going down on the Stinchfield ground? Ans. Yes, Mr. Rice took me down there I think a year ago last May. Ques. Took you down a year ago? A. Yes, sir. Q. Where was he working then? Ans. I think he was working with Voss there and he showed me where he had taken out some gold. Ques. Where did he show you where he had taken out some gold? Ans. Just below the line of the incline, 4 or 5 feet below, I thought it a very likely looking place for gold. Ques.

The vein where they were working at that time? Ans. I think Voss was working on the west vein and Mr. Rice, and I think Mr. Rice said he didn't think he would get any gold there. Ques. What did he tell you at that time? Ans. Told me he didn't think he would get any gold down there. He was working down below the intersection at that time. Ques. That was at this place marked on this plat intersection of east and west veins, was it? Ans. Yes, it was a little past the intersection. Mr. Rice's vein cuts across this
west vein right across from the wall. Ques. Cuts across
80 through? Ans. Yes, the way he followed the vein down.
Ques. On which vein was Voss working on? Ans. He was working on the west vein, down towards where his vein would come down. Ques. Where did he show you he had taken the gold out? Ans. About right here, (showing). Ques. At the point of intersection? Ans. Yes, sir.

Angus Graham, called by plaintiff, testified as follows:

I lived for a long time on Jackass hill. I commenced working there in May '89 and worked there till December. I was acquainted with F. B. Rice, now deceased, who was a defendant in this case. I know what is called the Rice incline on the Rice vein on the Carrington mine on Jackass hill. I was down that incline with Mr. Rice and Angus McAllister some time in May, 1889. We went around in the mine, the drifts that had been run there. When you turn to the left at the bottom of the incline you would be going north. I know the place where Rice and Stinchfield met in their works. I know a projection standing out in the works between Rice incline No. 1, and the point of meeting of the Rice and Stinchfield works. The conversation between Rice and myself took place mostly at the bottom of the incline. He said there was but one
man came in there before, who could tell where the most of
81 the gold had been taken out without being told. He showed
me just about where the bulk of the gold came from, it was about in front of us, on both sides north and south of the incline, but mostly in front of where we were standing. I don't remember exactly, but right around the bottom of the incline. He said that's where the bulk of the gold came from on that backbone, extending up the center of the excavation. He did not tell me how much he took out.

Cross-examination:

Q. That is the first time you were ever down there?

A. Yes, sir, I was working down on the river, and I had come up to look over the ground, was introduced to Mr. Rice and he invited us down.

Q. Did you go into the excavation at the bottom of the incline to any great extent?

A. As near as I can remember just what was opened there, some part of it had been filled up. When we got down the incline he pointed out what he called the hog's-back, and said there was where the bulk of the gold came out. That was the substance of his remarks. That was said at about the bottom of the incline. I was a witness before in this case at the former trial.

Q. The facts you have testified to now you didn't testify to before in this case did you?

82 A. Well, I don't know as I testified to all of them before, I could not say for certain.

Mr. KALLOCH: We desire now, if your honor please, to introduce in evidence the official transcript of the testimony of F. B. Rice, deceased, he being the party for whom the administrator J. T. Faxon is defendant, said testimony having been taken on Wednesday August 6th, 1890, and being contained in volume VII of the record of testimony prepared by the stenographer of this court. This testimony as offered is that taken at the previous trial of this case between the same parties, who are the parties to this action, relating to the same matter now in controversy.

Judge ROONEY: We object to it on the ground that the issues involved in this trial are not the same as those in the former trial, the issues as to the boundaries mentioned in the deed of the Pine Tree claim and in the complaint were not raised in issue at the former trial, that the issue regarding whether the Carrington mine or the Pine Tree mine was the older location was not raised in issue in the former trial; third that the license and justification of the defendants Rice and Voss to work under a parole license was not such an issue at the former trial.

Mr. OTIS: It is admitted that the witness Rice that gave his testimony is now deceased and that he di-d prior to this trial and that this testimony was taken at the former trial.

83 Mr. STREET: Certainly.

Objection overruled.
Exception noted. Exception No. 6.

The COURT: It is admitted that these notes are correct?

Mr. STREET: O, yes.

F. B. RICE'S testimony read in evidence, "marked Plaintiff's Exhibit C," being in substance as follows:

I first worked on the Carrington mine in May, 1885.

Q. Under what terms and conditions were you working there?

A. When I first went to work there I went to Mr. Gillis and he told me I could work on any place on his mining claim, I went to work prospecting on that portion and about the first of June I entered into a- agreement with him, I found a prospect on what is termed the Rice vein.

Mr. STREET: I desire to know what terms and conditions you started to work upon the claim. Just state with reference to the terms, how you went there and how long you worked there under those terms, when you commenced work under special arrangements, and what the arrangements were; just state what it was, Mr. Rice.

A. I went to work under the terms I was to give him, Mr. Gillis, ¼ of the gross proceeds.

84 Q. When did you commence work on those terms?

A. The latter part of May, 1885. I went to work on the Rice incline No. 1. There was an old prospect hole there. I sunk my incline on the upper of these two veins. I had sunk about 30 feet up to the 16th of Jan., 1886. I had sunk the main incline 30 feet and drifted some 11 or 10 feet further.

Q. On which side did you drift?

A. On the southwest side of the incline No. 1.

Q. That is the amount of work you had done on that drift on the 16th day of January, 1886?

A. Yes, sir.

Q. Were you up and on that claim at the time that Mr. Gillis and Mr. Stinchfield measured out the ground that Gillis was to deed to Stinchfield?

A. I was.

Q. Just state what took place there between you and Stinchfield and Gillis with reference to the lines between the Carrington and the Pine Tree claims.

A. Well, having heard that they were going there to measure the ground that he had sold, I came up on the ground and in going towards my main shaft I saw one coming from one side of the claim and the other from the other; they were stepping it off as I understood, and came to the mouth

85 of my incline No. 1, and there I made the remark,

"Is this the line, is this the measurement?" and I enquired who was going to pay me for my labor, and I objected to the line as I claimed this vein at the time. Gillis made some remark about not having any claim, and I told him there was my works; I had my windlass there and some tools in the place; then he said he would leave my veins out; I claimed these veins; they went over somewhat beyond to this certain oak tree. I forbid them not to ever come inside or nearer my incline than that certain oak tree, which is 26 feet outside from the vein. A few days after I saw the tree marked and it has been recognized as the line since that time by both parties, as the line between the two claims. I went down on, on the foot-wall of the incline. There is other veins closer to the line. I left them there and went about my business. I know nothing further. Afterward I prospected at different times. On the 7th of December, 1886, I entered into partnership with John Voss, and we sunk this incline. In sinking the incline I took out three or four dollars. At the top of the incline is a strata which I did not have at the surface, came to it about 20 or 23 feet down. At the bottom of the incline I found a crossing; it run very near north and south as near as I can tell, and dipped at all points of the compass. It would run in all shapes through portions

86 of the works, in some places a sixteenth of an inch, in some

places an inch and a half, probably two inches. I took out all this crossing between my hanging and foot-wall veins, at right angles between my hanging-wall vein and my foot-wall vein, I

judge to be about 16 feet. The hanging-wall vein I speak of is the one I found some 27 feet down the incline. I sunk on the main vein, there is two small veins back of the main vein, of course, I claimed the fartherest one. These three concentrate in the Rice incline No. 2. I have a network of veins as shown all through my stope, lying between the hanging and foot wall. I was from Jan. until the middle of August, 1888, making the excavation at the foot of the incline. I was working on what I considered my hanging-wall vein at the time we broke through into Stinchfield's works. Fred. and Harry Thompson and Stinchfield were there. I saw a color of gold; I said "Henry, take your pan and gouge that out, it's the first gold I've seen in a week;" it was from what I considered my hanging-wall vein where we met them. I sent Swerer for Gillis; he came down and blustered around a little, and told him they were on his vein; he got considerably excited. Previous to this time Stinchfield had wanted to come in the mine. When we broke through I asked him to come through and see the property and see the works. I took him and showed all there was to be seen;
87 he claimed the west vein; we contested that and said he had no right to it, and we claimed these veins on their dips and angles. Then told him at the same time I was willing to have it surveyed by a United States deputy mineral surveyor, and abide by his decision. Then he wanted to know if we couldn't measure it ourselves. I told him we might if it was agreeable. Then we measured the mine. Stinchfield, Fred. and Henry Thompson, and myself. We measured from the line of the Pine Tree and Carrington on a line with the oak tree I have mentioned to the Pine Tree incline; then measured down the Pine Tree incline; then we went back about four feet. I didn't consider he had any right to any crossing after it left their vein, and I gave them the privilege of putting up these timbers, on the line which ran at an angle across this lateral drift and timbering it up; or accounting for the money that came out of the incline or out of the drift. Warren Stinchfield drilled these holes; one I saw him drill, the others went to putting up timbers. Stinchfield did no more work on this drift. When I broke through into their works I was working between my middle and hanging-wall vein. There is but one place I have excavated, further than my hanging-wall vein, that is right opposite incline No. 1. There I have gone above the hanging-wall vein, possibly two feet and a half, and about three
88 feet in length. After we broke through, I did not continue working there. I considered it worked out. The most of the money I took out was in the middle vein, right on the crossing, at a point about four feet northwest of incline No. 1 and two feet northwest of incline No. 2, that's the place where I took the main part of the gold, between these two places, at a distance probably of forty feet. I found five or six hundred dollars on the middle vein before I got to the crossing. The cross-vein and my vein connected not quite at right angles; the main gold I got was in the intersection. They blended together and lost their identity; they increased in size at the point of contact. Along this line of intersection I got about $15,800.

Cross-examination:

What I call my foot-wall vein I found in 1885 I can't tell which one it is. I call it the foot-wall vein because it is the furtherest one that has a prospect. I call the hanging-wall vein so for the same reason. Going through the west vein I got my gold right at the point of junction of the west vein and what I call my middle vein. In the west vein I got gold between my vein. I took out five or six hundred dollars at the bottom of Rice incline No. 1, out of the foot-wall vein; there was gold in the west vein there and I took it out.

I have no idea how much I took out of the west vein. The
89 gold was distributed pretty regularly between the Rice incline
No. 1 and Rice incline No. 2, at the point of the intersection of the veins. Since our works met I opened out my middle vein a little, and found it didn't prospect and didn't consider it worth following.

I have never been up through Stinchfield's works. The gold I took out is distributed pretty regularly along the intersection of these veins. Stinchfield claimed the west vein at the time the *time the* works met. At the point of junction, my vein is not an east-pitching vein, it pitches more northerly. I think Stinchfield took that out. I claim it because it comes in contact with my hanging-wall vein. I don't know where its apex is, it don't make any difference. I claim it anyhow. If it continued in its course as it is there on its dip, a part of it might crop on Stinchfield's ground; it don't make any difference, it is mine anyhow. A year ago last May, I took out five or six hundred dollars at the end of the incline No. 1, from the foot-wall vein and the west vein, both. The gold was distributed through both in the point of intersection, entirely in the point of intersection.

Q. That oak tree you speak of, just look and see on the diagram, and see where the boundary line is: that's the oak tree you speak of marked "oak tree" on the boundary line?

A. I suppose it is.

90 Redirect examination:

The widest excavation made on that west vein was done by John Voss while I was in San Francisco; I never got anything out of it; that was done in February or March, 1889.

Q. What was the condition of things, at the junction of the middle vein and crossing? One cut the other or a union of the two?

A. A union of the two masses. The size of the vein or mass at the point of union was about a foot. It was quartz and quartz matter interspersed. An irregular mass. The foot-wall vein at the point of the junction was 4 or 5 feet below. I can't say, I never measured it. I found the gold at the junction of the middle vein and the crossing.

Q. On either side of that did you find any?

A. I found a little gold, an inch or two inches, at different places in both veins. I did not find any gold in the west vein between the junctions of the middle vein and the foot-wall vein with the west vein.

The COURT: You call the foot-wall vein, main vein and the hanging-wall vein; now I was speaking about the foot-wall vein and the main vein as you call it, the distance between these two, were they united with this Stinchfield crossing?

91 A. Some places three feet, some places four and some places five.

Q. Between these two points did you find any gold in the Stinchfield vein proper?

A. Yes, sir.

Q. Did you take it out?

A. I did.

Q. Why did you take it out?

A. I can take it all out.

Q. Now we will pass from the main vein to the hanging-wall vein where that and the Stinchfield vein came together, what was the condition of things there?

A. There, it just prospected.

Q. I am not speaking of gold; what was the union, was there a union of the two, that's what I mean?

A. Generally?

Q. Right at that point?

A. I think that the hanging-wall vein cut the crossing.

Q. Did you find any gold on that crossing?

A. I found a little prospect, that's all.

Q. Did you find any gold in the Stinchfield vein between the two
last crossings, between the crossing and the middle vein and
92 the hanging-wall vein; did you find any gold in the Stinch-
field vein that run between these two points of contact?

A. No, sir.

Q. You removed it did you?

A. I removed it all; I found a prospect; I removed all the mass, all the quartz prospected, more or less. When the hang'-wall vein and the west vein came together, there, it just prospected. I found no gold between the hanging-wall vein and the middle vein in the west vein. The bulk of the gold was in the point of intersection of the main vein or middle vein and what is termed Stinchfield's crossing, or west vein.

Q. Now this bulkhead that was put up there, you stated that there was an understanding between you and Stinchfield and the Thompsons that that should be the boundary line between your respective works?

A. Yes, sir, there was.

Q. That was put up there for the purpose of defining and marking that boundary was it?

A. That's the agreement. Stinchfield and myself participated in it and agreed to it. It was always respected by me and the other parties as the boundary between our respective works until this suit was started in January, 1890.

Q. That agreement as you stated was that he was to prosecute no work south from that barrier?

93 A. Southwest, that drift was four feet at right angles with the line, with the strike of the vein or 12 feet with the run of the wall and he was to keep in accordaning with the dip of his vein, the dip of the Pine Tree vein. That vein dips east, being the only one I recognized or considered as a vein and with that we settled and drew this line. I considered he had a right to all veins with the same dip of the Pine Tree vein, we made this as a side line and by giving him the same angle of his Pine Tree vein it gave him this and it was on that arrangement that we made the settlement.

Recross-examination:

I worked out everything, practically speaking, from incline No. 2 over to where I met Stinchfield, and when we met him he had worked out all he could some distance further north.

Q. And that's the point he agreed he wouldn't prosecute the work any further on the junction of these veins?

A. No. sir, we run the line and he was not to run southwesterly direction from that line, not to run towards me from my incline No. 1 to where we met Stinchfield is a northerly direction. I had taken out the bulk of the gold that is in controversy at the time I met Stinchfield. He never made any demand upon me for the gold I took out, prior to the commencement of this suit.

94 Q. Do you recollect having any conversation with Stinchfield in January '88 when he told you if you kept on going down on that vein you would run into his vein?

A. January '88, I never heard any such remark.

Q. At any time you were working there did you have any conversation with him in which he told you if you kept on working there you would work into his vein?

A. Yes, the substance of what he said was that he claimed a west vein at that time and that if I kept on working I would run into his west vein.

Q. Didn't you and Gillis tell Stinchfield if you took anything out the same belonged to him and he should have it.

A. No, sir, I am positive of that. Stinchfield wanted to go down into my works, but I didn't consider he had any business there. I did not know what he wanted to go down for. I wouldn't allow him to go. He asked me twice to go down. That was while I was taking out gold. I didn't care whether he saw it or not. I told him at the time the only way he could go in there was by an order of the court, then I would be willing he should go in, but under no other condition he should go in. He did not state what he wanted to go into my works for. He wanted to see what I was doing 95 down there. That was while I was taking out gold. The conversation with him in Gillis' presence, in reference to this west vein, his claiming it, was about a month before we were taking out gold. It was before we struck the crossing. I had my incline nailed up when I laid off a week or two, it was the month I was moving a building outside. At other times the incline was always open, anybody could go in that wanted to. The only time I closed it up was when I laid off, when I was cleaning up or had some work outside, when I was moving my house I closed it up at that time.

It is admitted by counsel for defendants at the time this money was taken out by Rice and Voss, Mr. Gillis was the owner of the Carrington mine and was interested with Rice and Voss in taking out that money.

A. W. STINCHFIELD recalled for further cross-examination.

Mr. STREET:

Q. Mr. Stinchfield, in your examination-in-chief when upon the stand you testified you never heard the Pine Tree mine called such prior to the time of your getting the deed from Mr. Gillis of the ground; I will now ask you if in the spring of 1884 at the Buckeye tunnel on Table mountain, in a conversation with Mr. Voss, in which Mr. Voss asked you where you were working, you
96 didn't state to him you were working upon the Pine Tree mine?

Mr. KALLOCH: We will object to that on the ground that it is a matter brought out by counsel upon the other side in the cross-examination of this witness, and they have no right to undertake to impeach him as to a matter brought out in their cross-examination.

Mr. OTIS: Further, before this question can be asked, he must ask him the time, place and persons present and the circumstances; that the proper foundation has not been laid, he has not asked him the circumstances or the persons present.

Objection sustained.

Exception noted. Exception No. 7.

Plaintiff rests.

Mr. STREET: I now move for a nonsuit in this case upon the ground that it has not been shown by the evidence that the defendants or either of them ever have at any time entered into or upon any portion of the lands or premises in the complaint described and have extracted and carried away therefrom any gold or other minerals of value whatever.

The COURT: Let the motion be denied and overruled.

97 Exception noted. Exception No. 8.

Mrs. ELIZABETH G. CARRINGTON, called by the defendants, testified as follows:

My husband's name was Timothy E. Carrington, he died in 1884. I reside in Lodi, San Joaquin county, California. I first came to Tuolumne county in 1851. I lived in this county for nineteen years at what is known as Jackass hill. I first became acquainted with the Carrington quartz mine in 1854. It was located in the spring, I think February 1854, by my husband T. E. Carrington, Elizabeth G. Carrington, Elisha Tyre, Thomas Tyre and Thomas Brookshire.

Q. How was the claim located?

Mr. Kalloch: We object to the testimony as irrelevant, immaterial and incompetent, first, upon the ground that in this action the defendants cannot be allowed to offer any testimony to limit or qualify in any way the title acquired by plaintiff in this action under his deed to any and every vein within the external limits of the ground conveyed to him by Mr. Gillis' deed.

The Court: The objection is overruled.

Mr. Kalloch: We note an exception. Will you stipulate
98 that all the testimony of this witness is taken subject to that
objection?

Mr. Street: Yes, certainly.

—. They posted notices of location, one upon the center and one upon each end of the 1,000 feet. At the northerly end of the claim the notice was posted on a live-oak tree, close to the gulch, below the house. These notices were posted along the line of the center of the vein.

Q. Were those notices posted more than once upon the claim?

A. They were posted—they have to be posted to keep other people from taking it.

Q. The notices were kept up?

A. Yes, sir.

Q. Do you remember the contents of the notices posted on the claim?

A. No, I could not tell exactly. I know it claimed so many feet.

Q. Did you ever have these original notices, Mrs. Carrington?

A. Yes.

Q. What did you do with them?

A. Well, they were destroyed one way and another, and I knew when we left the mine, of course we did not follow mining, our attention was directed to something else and our papers were destroyed, burned up.

99 Q. Were the old original notices of location of the Carrington claim destroyed at the time you moved away or afterwards?

A. Yes, they were destroyed time and again, but we had to renew them.

Q. Well, when you renewed them you posted them on the claim?

A. Yes, sir.

Q. And as time would pass they would naturally be destroyed?

A. Yes, go with the wind or somebody would come along and just curiosity or something else, tear them off, and of course, they had to be reposted.

Q. How many times in a year do you remember that these notices were posted and renewed?

A. Well, they were renewed always every three months.

Q. Did you keep copies of the notices you posted on the claim?

A. No, it was not necessary to keep copies of the notices.

Q. You did not keep any copies then?

A. No. The notices were kept up on the claim. I have had copies of those original notices, they were destroyed one way and
another. The notices were renewed on the claim almost
100 every three months. These notices would from time to time
be destroyed by the weather.. We lived right close to the Carrington mine. It came up right close to the edge of the yard. The notices of location were written in my kitchen. I knew the contents of the notices at the time they were written. I saw them when they were posted. They were written so as to take up say, say 1,000 feet one way and 100 feet on each side of the vein and all the dips, spurs and angles. They contained the names of the persons, the locators, I can't exactly say, being the notices written out them days. The first notice of location contained the following names as locators: Timothy E. Carrington, Elizabeth G. Carrington, Asa P. Carrington, Elisha G. Tyree, Thomas K. Tyree and Thomas Brookshire. After they located the claim, they worked on it, kept it up and tried to get gold out of it, that was from the time it was located at different times until we left there in 1870. Afterwards we sold the claim to J. N. Gillis.

The notices were posted on the Carrington mine, one was posted on the center of the claim and one at each end, one on an oak tree and one on a pine tree. The last time I was on the claim I saw the remains of the tree, the stump and a portion of the trunk is there but it is rotted down. While I was there the work was done on the
northerly end of the claim, there was considerable work done
101 right up to the northerly end. There is a small gulch running across the northerly end of the Carrington claim. That was called Squaweta gulch. The oak tree upon which the notice was posted at the northerly end of the claim was on the right bank of that gulch. The tree on the side line of the claim is still there.

Q. About how far is this gulch from the oak tree upon which the notice was posted at the northerly end of the claim?

A. Northerly end of the claim; well right on the gulch, on the bank of the gulch.

Q. Right on the bank of the gulch?

A. Yes, sir.

Q. This other oak tree of which you have spoken, where was that with reference to the gulch.

A. That was further on the side of the gulch; which? you mean at the northerly or southerly end of the claim?

Q. No, I am speaking of the northerly end of the claim; you spoke of an oak tree there, that is on one side of the claim?

A. Well, that other was off from that, off on the side of the gulch, above the bank of the gulch.

Q. That tree still standing.

A. It is not, there is one standing, the one that the side line was

on, the center one that is gone. My husband bought out the
102 interests of the two Tyrees and of Brookshire in the claim.
They gave my husband a bill of sale of their interests. These bills of sale got destroyed some way, after leaving the mine we had no more interest there, and we paid no attention to such things, and they all got destroyed. I could not find these bills of sale at the time my husband deeded the claim to Mr. Gillis, he said it made no difference. I have not been able to find them since.

At the time I lived at Jackass hill I knew a claim called the Pine Tree claim. It was taken up by my husband for working purposes in 1859 or 1860, I won't be positive which. I know he held 300 feet of it, but how the sides was I don't know. He put up notices on the claim, I was with him at the time he put them up. One notice was put on the windlass at the end and the other on a little bush, the bush had red berries on it, and resembles a live oak, it is gone now. The windlass was right at the big pine tree where the discovery was made. The pine tree is now gone. It was standing right where the windlass and house now is. The Pine Tree claim was east of the Carrington claim. The Carrington claim held 100 feet and the Pine Tree joined the Carrington on the east. My husband, Timothy E. Carrington, made the location of the Pine Tree claim. The notice claimed 300 feet on the claim, and I don't know
how many feet on the side, I think then a man was allowed
103 150 feet for discovery and then took up 150 feet. His name
was on the notice. He worked the claim himself, he hired a man once in a while to help him. I was acquainted at that time with the line between the Carrington and the Pine Tree mines. There was a shaft sunk right about on the line and it was called the Brookshire and some called it the Tyree shaft. It was sunk while I was there, my brother and a man named Brookshire sunk it. This Brookshire was the man named on the Carrington notice. My husband worked both these claims from the time they were located until he went away from there in 1870. He worked on one and then on the other, and then he would prospect around as all miners do. I discovered the Carrington mine myself. I discovered what we called the float. My husband of course, he followed it up and found it. I discovered that myself, what we call the "float," big quartz boulders. I took out the last gold we got from the Carrington claim. Took it out of what they call a crevice. I scratched it out on my apron and took it to the house and pounded it out. That was upon the Carrington claim right where it was first discovered, way up on top of the hill.

Q. Did any one interfere with your possession of the Carrington claim?

A. At one time Page and Lucas went on the Carrington
104 claim, and they worked there till my husband laid an in-
junction on them and put them off. My husband, at the time Page and Lucas were on the Carrington claim, was working on the Pine Tree mine. He had just worked out the assessment on the Carrington. Page's given name was Louis.

Cross-examination:

I resided at Jackass hill from '51 till '70. The notices on the Carrington claim were renewed every three months I think. They have to keep them up to hold the claim, go by the local laws. The location was made in February, 1854. My husband renewed the notices as often as every three months. After he bought out the others he signed the notices Carrington and Company. It was a company claim, that's the way it was called, himself and me. After I left this county in 1870 I never returned until now. I came here on the 26th of last month. I have been stopping at Billy Gillis' house. I have been down to the mine and have seen the lines since I have been here. I have been to the house I used to live in. The house is now occupied by J. N. Gillis. Elisha and Thomas Tyree and Thomas Brookshire went away from this county in '55 and '56. My son Asa died in '56. My son did not give my husband a bill of sale, he died and of course my husband got the estate. After '56
my husband held the claim by posting notices and working.
105 He always signed the notices Carrington & Co. The tree, at
northerly end of the claim, upon which the notice was posted, was a live-oak tree. Below the notices were my husband's initials on the tree, T. E. C., that tree is gone. The other tree I have spoken of was one of those on the side line, that was east, towards the Pine Tree claim. When at the mine lately I went to all the corners.

Q. Who showed you the corners?

A. Why, I know the corners myself. There has been a great deal of work done on the claim since I was there. I did not notice a deep hole when I was on the ground. It was terrible weather when I was out there. Where I found the float quartz was at the place commonly known as the place where Carrington got his gold. I don't know what the place is now, the hole was not very deep then. I went on the claim when I was there the other day with William Gillis, Mr. Stillman and James Gillis. I did not go along the whole line of the claim or to the place where I made the discovery.

Q. Did you go along anywhere near the work done in the mine?

A. I did not go over very near there, I could not go straight.

Q. Did you go so you could look?

A. I could see from the house and see from where I was.
106 I could not go over them rocks. I didn't go entirely around
the claim. I showed where the lines was and the corners. I hadn't been on the claim since I left there in 1870. At the time my husband and the other parties located the Carrington in 1854, they stepped off the claim, that's the way they measured the ground. My husband located the Pine Tree mine. It joined the Carrington claim. We were not particular about the lines in those days, so we held the ground. I do not remember what they said, if they said anything, about being bounded by any other claim. I do not remember how wide it was. My husband located the Pine Tree mine in '59 or '60. He posted two notices on the claim. He posted one notice on the Pine Tree which is gone now. That was

at the northerly end of the claim. The notice at the southerly end of the claim was about 300 feet from the other, he claimed a little ground to the north of the notice on the Pine Tree. In the notices that were posted on the Carrington it was always called the Carrington claim. In the notice on the Pine Tree claim it was designated as the Pine Tree mine, that's the way we distinguished it.

My husband either worked on the Pine Tree mine or posted notices from the time it was located until we went away. Either worked on it or posted notices; when you work the assessment you know it holds for such a length of time, if he was not 107 a-mind to work the next assessment he had to renew the notice. He did not post notices any oftener than one in three months, it was not necessary. When we left Tuolumne county in 1870 we went to Tulare county. My husband never sold any interests he had in Tuolumne county except to Mr. Gillis. He sold to Jim Gillis the Carrington and the Pine Tree. After selling him the mines in '73 I did not see J. N. Gillis again till in '92. I saw him then at my house at Lodi. He came to my house twice or three times. Judge Rooney came with him once. That was in January last. I went with them to Stockton and met you there (addressing Mr. Otis). I have known Mr. Gillis ever since he was quite a young man. Gillis was around Jackass hill from '54 to '70, he knew we owned the mines, he worked some on the Carrington, my husband allowed him to dig off the surface with the proviso that he would have half the gold if he struck anything in the quartz vein that belonged to my husband. He worked at the edge of the gulch on both the Pine Tree and Carrington mines. He knew we had two different claims there. Mr. Gillis is an old friend of ours; no more so than others I am acquainted with.

Q. You have talked first and last since Mr. Gillis came to your house about the "Pine Tree"?

A. Yes; talked a good deal about old times.

108 Q. These particular mines, the Carrington and Pine Tree, you have talked a great deal about, hav-n't you?

A. I don't know that we talked a great deal more about them than other mines, the Santissimo, Carrington, Wilson & Means, altogether all there. I don't know as we have talked about the boundaries particularly. I went with him and showed him where the lines and corners were. At Lodi I did not talk about the boundaries and corners, we talked about the ownership of the ground. Before I gave my deposition in Stockton I also had some talk with Judge Rooney and Mr. Gillis about the boundaries of these claims and the location. When Gillis came to see me at Lodi he told me the Pine Tree mine was in litigation, and that he expected that he would want me as a witness. He wanted to know whether I knew about the Carrington mine being located and how much on the length of it, and wanted to know whether I knew that the Pine Tree vein was a different vein and I knew it and told him. The next time I saw him he said he would want me as a witness. I went before a notary there in Lodi and stated we took the claims, length and width, that's all I think I stated about it. Mr. Gillis did not ask me any questions; I just stated it to the notary. He told me he knew we located the claims and wanted me to go and give my testimony in regard to locating them, how we located and on which claims.

109 Q. What claims did he tell you that he knew you had located?

A. Why, the Carrington claim and the Pine Tree claim.

Q. Then he told you down there in Lodi last fall that he knew you and your husband had located the Carrington mine and the Pine Tree mine, did he?

A. Of course, he did, because he did know it. When I came to Tuolumne county this last time, Mr. Billy Gillis took me over to Jackass hill to Jim Gillis' house. That's when I went over the claim. I hadn't seen that mine from the time I left there in 1870 till I came there the 26th or 27th of last month. The country on top of Jackass hill has changed, some of the old landmarks have gone, trees cut off. The old pine tree that I spoke of that makes the boundary of the Pine Tree claim is entirely gone, I did not see a vestige of it. I don't remember a deep hole on the Carrington mine; it rained when I was there. I do not know how long I was on the claim, a short time, a few minutes, not a great while. The last day when I was there it was a terrible rainy day. Mr. Street was with me. I noticed there had been a great deal of work done there since I left.

Q. Did you notice whether that work was done on the Carrington or Pine Tree as you know it?

A. Well, I noticed lots of work done on both.

110 Q. Taking the Old Carrington as you knew it, would most of the work be done easterly or westerly of this center line you spoke of?

A. Well, the way they throwed up rock I could not state. The most work that has been done has been done since I left there. They were simply prospecting when I was there.

I will be 69 years old the 21st of June.

Q. What date as near as you can remember was the last notice posted that you saw posted on the Pine Tree claim?

A. Of course, it was the year I went away from there.

Q. How long before you went away from there?

A. I could not tell you exactly how long before, or else my husband could not have held it.

Q. Then you saw the last notice just before you went away, and three months prior to that you saw another notice, three months prior to this second notice did you see another notice?

A. I suppose I did. I knew we held the ground by keeping up the assessments and posting notices.

Q. That's why you testify you saw the notices every three months.

A. I do say, in order to hold it; I did not run down every time a notice was posted.

Q. You did not see them posted?

111 A. I know they were there. I know we had to keep them there in order to hold the ground.

Q. That's why you testify they were there because you knew that they had to be there?

A. Yes, sir.

Redirect examination:

We left Tuolumne county in July, 1870. My husband left a man by the name of Richard Stoker in charge of the mines when we went away. He had charge of everything till Mr. Gillis bought it.

If the assessment-work had not been done on the claims we renewed the notices, we had either to renew the notices or do the assessment-work.

Q. During the 19 years you were there, say take it from 1854 on the Carrington claim, till the time you left there, I will ask you to state whether or not the work was done on that claim.

A. Each year and several times a year.

Q. How about the Pine Tree from 1859 down to the time you left there?

A. Done his regular work there, too.

Recross-examination:

My husband in 1872 sold to J. N. Gillis everything he owned in this county. He sold nothing to anybody prior to selling to Gillis.

112 Q. You have stated to counsel on the other side that either the notices had to be renewed or the assessment-work done?

A. Yes, sir, that's the way it was, that's my recollection of it. I don't know whether my husband renewed the notices or did the assessment-work.

Q. In 1869, the year before you left, do you know whether the Carrington claim was kept up by doing assessment-work or by renewing the notices?

A. He done it himself or hired it done.

Q. Which way did he do, renew the notices or do the assesment-work?

A. I can't tell you because he went to the East and he had the assessment-work done before he went.

Q. In 1868, do you know whether the notices were posted to keep these claims up or whether the assessment-work was done?

A. I could not say.

Q. I suppose it is the same way in previous years, you can't tax your recollection?

A. No, I know it had to be done in order to hold them, and we held them.

The quartz-mining laws adopted by the miners of Tuolumne county in the year 1858, offered and received in evidence, and are as follows:

113 Article 1. The jurisdiction of the following laws shall extend over and govern all quartz-mining property within Tuolumne county.

Article 2nd. Each proprietor or locator of a quartz claim shall be entitled to one hundred and fifty feet in length (150) on the vein including all its dips and angles; also one hundred and fifty feet (150) on each side of said vein, together with the right of way on either side of said vein to run tunnels and drifts any distance that may be necessary in order to work said vein, provided: that the right to one hundred and fifty (150) feet herein granted on each side of the vein shall not be deemed to conflict with or detract from the right of any subsequent locator who may discover a vein outside of said one hundred and fifty (150) feet from following his said vein through said ground.

Article 3rd. The original discoverer of a vein shall be entitled to hold three hundred (300) feet in length on said vein by virtue of discovery.

Article 4th. No man shall by virtue of pre-emption be entitled to hold more than one claim on the same vein except as provided in article 3rd.

Article 5th. All quartz claims hereafter taken up or located shall be plainly marked by notices posted containing the claimants' names and the number of feet claimed.

114 Article 6th. The parties locating a quartz claim shall put at least one full day's work on said vein in every thirty in order to hold the same. A day's work shall be eight hours' labor; provided, however, that the sum of one hundred dollars expended on said claim shall hold the same for six months from the date of its expenditure.

Article 7th. Any individual, company or companies erecting machinery for working quartz shall by virtue of said machinery hold the vein or veins belonging to said individual company or companies.

Article 8th. These laws shall be in full force and effect from and after the 1st day of September, A. D. 1858.

W. G. HESLEP,
*Chairman of Committee.*

E. P. McKNEW, called by defendants, testified as follows:

I have been living in San Francisco about 20 years. Before going to San Francisco I resided at Jeffersonville, Tuolumne county. I first came to Tuolumne county to reside in 1856. I lived in Tuolumne county from that time till I went to San Francisco in '73 or '74. When in this county I became acquainted with the locality called Jackass hill. I went up on Jackass hill to mine in 115 '59, I stayed there till '66. I went up there to work on the New York vein. I then became acquainted with the claims there, I of course knew the Carrington and Pine Tree claims. As near as I recollect around there I noticed a tree standing there with "T. C." on it on the northwest boundary of the Carrington claim.

I got acquainted with Carrington along about '61. I was frequently thereafter at his house. I saw a notice upon the northern boundary of the Carrington claim on a live-oak tree. It was the notice of Carrington and Company. Mr. Carrington was the owner of the claim and worked it at that time. I was over and on the claim along in these years, '60, '61 and '62, every two or three days. I lived within 300 or 400 yards from the Carrington claim. I could not say for what length of time I saw a notice on the Carrington claim, but I would go along once in awhile and it would be looking pretty ragged and dirty. I would go along again at another time and see another notice placed upon it. I never examined these notices closely except I knew he claimed the ground, that he claimed the ground long before I went there. I do not know as I ever went up to examine it. I also saw a notice on the ground on the brow of the hill. I think it was near the vein. Carrington claimed 100 feet on each side of the vein and 1,000 in extent on the claim.

116 The Pine Tree mine was just east of the Carrington claim. There was a notice on a pine tree there. This Pine Tree claim was a claim located after I went there, he was locating everything about there, it was this Atlas mine, Waters mine, made the interference with him. The Pine Tree mine was located in 1859 or 1860. I saw the notice.

Q. State what you saw on the notice at that time.

A. I saw a notice, "We the undersigned—I claim this claim"—I don't know exactly the way of it now, but he claimed 300 feet in extent, "I the undersigned claim 300 feet of this vein—this mine," and I don't think it designated any width at all there. T. Carrington was the name signed to the notice.

Mr. STREET: What work, if any, do you know having been done upon these two claims there the time you was there on Jackass hill?

A. Well, he was prospecting round there more or less all the time, he would go off sometimes and come back again.

Cross-examination:

117 From the time I left Tuolumne county, about 19 or 20 years ago I was not back to Jackass hill till about six weeks ago. He was down there and asked me if I would testify to what I knew in regard to these mines. I then went on Jackass hill with J. N. Gillis. He asked me to come up. I do not think I was up there over an hour and a half. I looked around at these veins he said was in dispute.

Q. Mr. Gillis took you around and showed the different points on the ground?

A. Showed me in order that I could go and recognize them. I told him some of the old landmarks there I could distinguish.

Q. What did he show you there?

A. Showed me the Pine Tree vein—asked me if I remembered where the Pine Tree vein was. He asked me if I knew where the Pine Tree vein was, and I told him that I thought I could go and

point out the spot, and I came within three feet of it. There had been a great many changes on the surface during the time I was away. A great many trees had been cut down and young trees had sprung up. Very different in appearance, more scrubby. There was an oak tree there that I remembered having seen before. I remembered where the live-oak tree was on the northwesterly boundary of the Carrington claim on the Carrington vein. There appeared to be a little hole there and a little pine tree stood there about the spot where the live oak stood. I had not seen the spot for 20 years before. The little pine tree was there, four or five feet
high. It looked to me to have grown out of the same spot where
the live oak had been before. I don't know as it grew out
118 of the same spot or not. I think it was within four or five
feet of it. I hunted up that vein in order to establish where
this tree stood or had been. Mr. Gillis showed me the vein and I followed up the vein to the point where the oak tree used to be. I followed the vein till I found the place where I thought the oak tree ought to be.

Q. What else did Gillis show you over there about these claims, what other points, marks or boundaries?

A. That's about all my attention was drawn to, but he wanted to know if I thought I could designate the distance between the two veins. I told him I thought I could. I told him I knew the boundaries, I knew there were two different claims. I knew Mr. Carrington claimed two claims. I owned a claim about 600 yards from the Carrington claim. I can tell today.

Q. You now tell me you could go there today and establish the line between what you say is the Carrington and Pine Tree claims?

A. I can tell about the direction, the way I imagine, the way it was when I left there, Carrington took them as two separate and distinct veins, when I left there. When I left there, Carrington
took them as two separate and distinct veins. I have known Mr.
Gillis since 1860, I think. I am on pretty good terms with
119 him. I saw a notice posted on both the Pine Tree mine and
the Carrington mine. On the Pine Tree mine I saw the
notice posted on a big pine tree there. That tree is not there now. I know pretty close to where that tree stood. I knew the ground there for four or five years. I saw and read the notice posted on the pine tree. That was in '62 or '63. I don't know that I ever read the notice more than once. I never paid particular attention. I might have read it two or three times. I don't remember how many times. I read it twice anyway. I don't remember the year. The notice as far as I remember read "I the undersigned claim 300 feet on this vein," that he would keep it up—signed T. Carrington. I did not keep any copy of the notice. On that notice it was "I the undersigned" or "the undersigned" I don't know which, it was one or the other. It is so long since, it slipped my memory, I had other business to attend to. I saw the notices on the Carrington claim along from 1860 to 1866. I saw the notice on that claim at various times. I never paid any particular attention to it. It said Carrington & Co. I also was acquainted with the Santissimo

mine over there. I don't know as I can describe the boundaries of that claim now. I also knew the Wilson & Means mine. I don't know anything about the boundaries of it. I don't know exactly the number of feet they took up on it. I never saw a notice
120 posted on the Wilson & Means mine. I remember seeing a
notice posted on the Santissimo mine. I read the notice, I don't remember the contents of the notice, I remember Page owned it. I do not remember the Chilano mine.

WILLIAM R. GILLIS, called by defendants, testified as follows:

I have lived in Tuolumne county since May, 1863. I lived on Jackass hill from '63 till 1867, then I went from there to Virginia City and returned here again in 1870, and have been living in the vicinity of Jackass hill ever since. I knew a man by the name of Carrington very well. I became acquainted with him on the day of my arrival in this county. I was very friendly and intimate with him. I worked with him for the most of the time from '63 to 1867. When I came to this county in 1863 Carrington was engaged in working the Wilson & Means, and on the Carrington and Pine Tree mines. I became acquainted with the boundaries of the Carrington claim in August, 1863. At that time Carrington had a notice on a pine tree which is now rotted down, that was at the southeasterly extremity of the vein, a large pine tree, claiming 1,000 feet in a northwesterly direction. I have written renewal notices for Carrington several times. I was familiar with the notices put up on the Carrington claim. The
121 claim extended from the pine tree northerly, crossed that
little gulch maybe about 75 feet to a live-oak tree that used to stand there where there is a hole now. The contents of the notices which I wrote for him that were posted on the Carrington claim were about as follows: We the undersigned claim 1,000 feet of this quartz vein with 100 feet on each side of the vein for working purposes—no, I am wrong there; we the undersigned claim this quartz vein with all its dips, spurs and angles together with 100 feet on each side of the vein for working purposes, and then Mr. Carrington's signature and those associated with him. Carrington signed the names to the notices himself. I was familiar with three of the veins in the Carrington claim at that time. The location was made on the center vein, it was west of the Rice vein, where the old blacksmith shop stood, that is the Carrington vein, that center vein, Mr. Carrington used to call it. The vein- included in the original Carrington location were the Rice vein, the center vein and one west of that where Carrington and I did considerable work. The northerly end of the Carrington claim was a large live-oak tree. I have seen a notice posted there. I don't know that I ever saw any marks except that tin notice there for years. The westerly boundary was where he joined on the Santissimo and on the northeast was a live-oak tree standing there today.
122 That live-oak tree is about 100 feet from where I saw the
notice posted there. I became acquainted with the Pine Tree

mine in August, 1863. I then became acquainted with a portion of the boundaries, I never knew exactly the boundaries of the Pine Tree claim, I only knew that he claimed 300 feet from the edge of the gulch. Mr. Carrington showed me a notice there, claiming in his own name 300 feet.

Q. How did he come to show you that notice?

A. Well, I had leased a piece of ground from him on the Carrington claim where I had a pocket, when I got through working on it, I didn't know there was a separate location and as I had found a prospect on the Pine Tree and went to Mr. Carrington and showed him, and he told me he wouldn't allow me to work, that that was a separate location and he intended to work it himself, it was at that time he showed me the notice on the Pine Tree claiming 300 feet. He claimed 300 feet in length on the vein, claiming from the edge of the gulch, that pine tree was about the center of the claim and he posted his notice there on that.

The general course of the veins on the Carrington mine southeast and northwest. Their dip is to the east. I am acquainted with
what is known as the Rice vein. That vein has its apex on
123 the Carrington claim. I don't know as I knew that particular
Rice vein at that time, August 1863, there was so many. It
apexes within 100 feet from the center of the Carrington claim. I am also acquainted with the Pine Tree vein. It has its apex on the Pine Tree mine. I was acquainted with F. B. Rice in his lifetime. I worked for him a day and a half. At that time he was working near where he was taking out gold there, it was after he started his No. 2 shaft. He was sinking about 20 feet from that old Brookshire or Tyree shaft on the Carrington ground, he was near the line of the Carrington and Pine Tree where he sunk the shaft. He was working in that incline at the time I worked a half day gouging from his upraise to meet him. He was working down in Rice incline No. 2. The Brookshire shaft I have spoken of is the same as the Stinchfield south or Old Carrington incline as marked on the map. I was working for Rice at about the foot of the Brookshire or Stinchfield south or Old Carrington incline. I got the gold between the foot-wall, east vein and the middle east vein on the crossing. I didn't work above the middle vein, I saw a little gold there at the intersection of the other veins. The middle east vein and the foot-wall east vein have their apex on the Carrington mine. I
was working on the vein upon which Rice sunk his incline.

124 Q. Where were you working at the time upon which you
testified when you say Carrington came and told you not to
work there, that he intended to work it himself?

A. That is in the east corner of the Brookshire shaft. That day he took and showed me the notice on the pine tree, that was the notice on the Pine Tree mine. Since that time I have worked on the Pine Tree mine, Carrington and I worked there awhile. That was in 1865. I started to work on the Pine Tree mine with Mr. Stillman and was there only a portion of a day, that was in 1866, in the fall or in the spring of 1867. Mr. Carrington told me I might work there and give him a share. I took Stillman in as a partner, we took our tools, went on the ground and began work. Mr. Carrington came over and the question arose as to what royalty should be given him, he demanded one-half, we were not willing to give half, so we stopped work on the mine.

Cross-examination:

I was a witness at the last trial of this case. I am a brother of the defendant J. N. Gillis.

Q. How much gold did you take out for Rice at the time you testify to?

A. I don't know, I left the gold I took out there in a flour sack,
half or two-thirds full, he afterwards went into the incline and
125 got it. I don't know how much there was in the rock. Rice
afterwards told me there was only an ounce, or $20 in it.
That was all the gold I took out. I worked with Stillman on that ground either in the fall of 1866 or the spring of 1867. I worked there about half a day. We worked east from where Mr. Stinchfield's shed is there now, perhaps 50 feet east, nearer the dump. I don't know any particular name for the vein we worked on, it was one of the spurs we cut while there. The Brookshire shaft at that time was sunk on three or four vertical spurs running down there. As far as the Brookshire shaft extended it was identical with the Stinchfield south incline, at the surface I don't think that west crossing was there, it finally reached that vein in sinking down. The west vein don't crop on the surface in that shaft to my knowledge. I have known the Pine Tree mine since August, 1863. For aught I know that west vein crops there on the hill. I knew it was a distinct location from what Carrington told me and from the notice he showed me posted on the big pine tree. He showed me that in 1863. I don't know whether I saw it after that or not. I had no interest in it.

Q. Did you know at the former trial of this action of the Pine Tree having been a distinct location from the Carrington?

A. Yes, I did.

Q. Did you ever tell your brother James N. Gillis about it?
126 A. I do not think there was any question about it, I did
not tell him. I never had any conversation with him about
it at the time of the former trial. I did not hear him testify at the former trial. I know Carrington had a location there of the Carrington mine, I have written notices of location for him, renewal notices. I have written as many as two, I don't know whether I have written more for him or not. I wrote those renewal notices between the years 1863 and 1867, at different times. I wrote those notices at his request. I saw the notices after they were posted, I did not see them posted. I saw the notices on the tree. The last notice I saw there claimed 1,000 feet on the vein with all its dips, spurs and angles, together with 100 feet on each side for working purposes, Carrington signed it and by other names I don't know who they were, I don't remember all the names. I know the claim was kept up by posting new notices, and work done on it, I have

assisted Carrington in doing the assessment work on the mine. I worked with Carrington on the Carrington mine from 1863 till 1867 at different times prospecting with him there. I worked there with him as a partner. I got a share of what was found. I did not work all the time during these years. I mined on different places all over that section of the country during these years. I did 127 not do any constant mining on the Carrington unless we struck a pocket. I remember two pockets we struck on the mine while I worked there. I worked there one time for three months and at another time for six weeks, that was all the work I did there except prospecting. I knew the Maximillian mine as a location, on the Carrington by Louis Page and partner. That was substantially the same as the Old Carrington. The Maximillian claim was maintained there only a very short time. Page did not work there long.

David R. Stillman, called by defendants, testified as follows:

I first came to Tuolumne county in 1854. I first located when I came to this county about a half a mile from Jackass hill. I lived there till 1870. I was familiar with the Jackass Hill locality. I knew T. E. Carrington. I also knew Jim Gillis. I also knew the Carrington mine. I know one of the boundaries of that claim, a live-oak tree on the north end there, just below where Gillis lives, but the other I don't, the other end. I don't remember that I ever saw any notice of location upon that end. I don't think I was on the ground till about '58 or '59, I have heard of that mine ever since I came to California. I first knew the Pine Tree mine about '64 or '65. At that time Mr. Carrington showed it to me. I 128 was on the mine and saw his notice up. The notice was posted on a pine tree, right by a blacksmith shop. The pine tree is not standing there now.

Q. Just state the contents of it as you recollect it.

A. I do not—I couldn't—We the undersigned claim 300 feet——

Mr. Kalloch (interrupting): Do you know what the contents were?

A. No, I don't. I know it was a notice, same as all other notices. I could not state what the notice contained, any more than it was a notice and Carrington's name to it. I testified that it claimed 300 feet of this ground. Mr. Gillis and I once started to work there. That was I think in the fall of '66. We went there to work on the shares. We took our tools there, and worked a portion of one day, and Carrington came over and wanted us to give him half so we threw it up. We worked right close to the pine tree. I never did any further work on the mine after that. I used to be there at the hill a great deal.

Cross-examination:

I now live at Merced, I have lived there off and on for 12 years. I left this county for good in '70. It was in 1870 that I was at

Jackass hill before this last time. I was not there since that
129 time until about two months ago. I had come up at Mr.
Gillis' request as a witness in this case. I have been over the ground with Gillis. I pointed out to Gillis where the pine tree stood. There is no tree there now, no remnants of a tree. There has been a great deal of work done there in the last 22 years. Some changes of course, grown up, more shrubbery around there, small pines. Since I have been there this time I have looked over the Pine Tree ground. Since I have been here this last two months I have been prospecting on Gillis' ground. The first notice I saw there was in 1864. That is the one I have been testifying to. Once is all I remember reading it.

Q. Did you read it any further than to see it was a location notice?

A. Location, "We the undersigned claim this ground, we claim 300 feet."

Q. How do you know it contained these words?

A. If it had not contained them it would not have been a notice. That half day's work was all I ever did on any of these known claims.

Llewellyn Pierce, called by defendants, testified as follows:

I came to Tuolumne county in 1849. Since that time I have lived on Mormon Creek, Jeffersonville. I am acquainted with Jackass hill and locality. Have been acquainted with that locality
130 since 1850. I was acquainted with T. E. Carrington. I first
became acquainted with him in '50 or '51. I used to be acquainted with the Carrington mine when I was up there. I first became acquainted with that mine in 1854. I fix that date in my mind from the fact, that I had been away from here for nearly a year, been down to Brazil and back to the States and I came back here, and Carrington being a particular friend of mine as soon as I located again I went up to see him. That was in the fall of 1854. Carrington was then living in the house now occupied by Jim Gillis. I was up there at that time a half a day more or less. I went there to pay him a friendly visit. That's the first time I knew anything about the Carrington mine. He was laughing at me, I had been spending money, he had been making some—had taken out a pocket near that oak tree there, there was a notice on it. Where he found the pocket was upon a little knoll very near one of those oak trees I spoke of, one of which is standing now. Whether it is the one the notice is on that is standing, or whether it was the one that is gone that the notice was on I don't know, they stood very near together. They were possibly within fifty feet of each other more or less. I saw the notice at that time on one of these trees.

131 Q. Have you any recollection of the contents of the notice
that was on that oak tree?

A. Nothing—it was wrote or read the same as all other notices in those days, I was a placer miner—nothing only distinguishing the claim; that's all; just the same as all others, so much on this lead, dips and angles, so much on each side for working purposes.

The notice specified 1,000 feet in length along the vein and 100 feet on each side for working purposes. On the notice were the names of the three Carringtons, and three other names. I was not acquainted with them, there was six names on the notice. After that time I frequently visited Mr. Carrington at Jackass hill up to '70. I became acquainted with what we call the Pine Tree claim, that was located some time in the early sixties. There was a notice on it claiming 300 feet, that was east of the Carrington. The notice was on a pine tree. The tree is not there now, it stood where there is now a cabin, shaft and windlass. That Pine Tree claim was Carrington's.

Q. How often did you see that notice on the pine tree?

A. I never took particular notice of it but once or twice, in the sixties he was having some trouble with some Austrians about jumping a piece of this claim, one time I was up there, at that time,
he and I went to this notice and read it and to the Carring-
132 ton notice and read that at that time. I saw one on the
Carrington and one on the Pine Tree. I think that was in
1865. It was the time he was having some trouble with Page and Lucas.

Cross-examination:

Q. How do you know what year Page and Lucas had the trouble with Carrington?

A. I don't know, I told you I thought it was about 1865. I have been jogging my memory about the matter. Last fall I was over there and talked with Mr. Gillis about the lawsuit, and he and I went out and looked over the ground. I have had no conversation with Judge Rooney or Mr. Street about the Page suit. I don't know whether the Page and Lucas trouble was about both the Pine Tree claim and the Carrington claim, or whether it included a portion or only one of the claims. I first saw the notice on the Carrington claim in 1854. I only remember the substance of the notice. I had a talk with Carrington about the notice in 1871, he was here then and stopped at my house over night and we talked about the claims, he wanted to sell them to me, he had been gone away from here about a year. I am not friendly with the plaintiff Stinchfield. I have been in litigation with him for about ten years. If he is
wrong I would like to see him lose this suit, if he is right I
133 want to see him win it. I live about three miles from Jackass
hill. My business for the last thirty years has been gardener, fruit-raising, one thing and another. I have also been mining up till about 15 years ago. I never mined any on Jackass hill. I would see the notice when I would go up there, I would see an old notice posted, look like it had been up some time, at other times it would look like it had been renewed. The first time I was there it had on it these names I have spoken of, afterwards Carrington and Company. I have had no conversation with anybody about these notices within the last two weeks.

Redirect examination :

I met Mr. Carrington at my house in 1871, he then told me he wanted to sell the Pine Tree mine, the Carrington mine, the house and everything, he told me if I could get him $1,000 I could have all over that I could get for the property.

LOUIS PAGE, called for the defendants, testified as follows :

I have lived in Tuolumne county continuously since 1856. I am acquainted with the locality called Jackass hill. I first became acquainted with that locality in '57. I mined on the trail that leads from Tuttletown to Jackass hill. I became acquainted with T. E. Carrington in 1865, I had known him by sight before, I had 134 no business with him before that time. I became acquainted with the Carrington claim in 1865.

Q. What other claims did you know of, that is claims situated on Jackass hill, in 1865?

A. There is the Waters claim, they call it the Atlas mine now, I worked there the same year on that mine, and then the claim we call the Pine Tree. The Pine Tree claim was northeast of the Carrington claim, that I worked on, what they claimed to be the Carrington claim. I worked on the Carrington claim in 1865, it lies west of the Pine Tree mine. I worked there 4 or 5 weeks. I worked there for myself. Old Carrington came in there with another man named Dick Stoker, to prevent me from working on that ground, I told him what title have you got to drive me off the ground, I told him I didn't believe he had any title to it, that he had more ground than he could hold, I worked there for a week or ten days more and then he turned round and served an injunction on me. I then went to see a lawyer in Columbia, went back again, and old Carrington came to me and wanted to compromise, I told him as he had brought the suit, if he would pay the costs I would leave the claim to him and go to work on the Atlas mine. I told him if he would dismiss the suit and pay the costs I would quit work on the claim, that we would go to work for $3 per day, 135 work for wages, we did not make much working there. At the time I worked there Carrington worked on what they called the Pine Tree claim, stood pretty near me and his house where his family lived. He was working northeast of me. I was working on the Carrington vein, on what is called the Carrington vein.

Cross-examination :

I am acquainted with Stinchfield and also with James Gillis. I worked on what was known generally as the Carrington ground in 1865. I went to work there and stuck up a notice as the Maximillian mine. I didn't notice any other notices there at all. I worked there about 4 or 5 weeks. I did not get permission from Mr. Carrington to work there. Louis Lucas made the location of the Maximillian with me. I worked on what they called the Carrington vein. During the time I was working there I did not see any of Carrington's notices on that claim to my knowledge. I only located the one vein. The injunction suit that was brought against me was never tried. Carrington paid the costs and I went off on an adjoining claim and worked for wages. I did not see any notices, did not look for any notices on the Pine Tree mine.

Q. How do you remember first hearing it called the Pine Tree claim?

136 A. Well, the miners around there, most everybody would say there is the Pine Tree. On the Pine Tree mine there were several cuts there and lots of prospect holes. At the time I located the Maximillian, Carrington called the ground the Carrington mine, and the Pine Tree claim was then known as the Pine Tree claim. I did not know the boundaries between the two claims. In those days we took 150 feet on the vein, that's all we were allowed. I was down there today with Mr. Gillis. When down on the ground today the Carrington vein was not pointed out to me, I found it myself. I saw the shaft, I don't believe it was touched since I left it, same place where the windlass was, lots of work done alongside of it. The big pine tree I have spoken about was on the Pine Tree claim. During the 4 or 5 weeks I worked there Carrington did not work on the Carrington claim. That was in the year 1865. He was working on the Pine Tree claim. He was working there when I commenced to work. I didn't go down where his works was. We were working on this side of the knoll. We were 75 or 80 yards from him.

Q. You state this suit was begun in '65?

A. Yes, sir.

Q. You say T. E. Carrington and Elizabeth G. Carrington were plaintiffs and Louis Page and Louis Lucas were defendants?

137 Judge Rooney: Mr. Otis the pleadings would be the best evidence of that.

Mr. Otis: Very well then, it is admitted that this is the complaint that was served. Admitted that this is the complaint in the suit mentioned and introduce it without objection?

Mr. Street: Yes.

Mr. Otis: I will read it in evidence and let the reporter take it down. (Reads) "In the district court of the fifth judicial district, State of California, in and for Tuolumne county, T. E. Carrington and E. G. Carrington *vs.* Louis Page of Tuolumne county, *ss.* T. E. Carrington and E. G. Carrington, wife of said T. E. Carrington, by Caleb Dorsey their attorney, complain of Louis Page and Louis Lucas, of the county of Tuolumne, State of California, defendants, that heretofore, to wit, on the 1st day of May, A. D. 1865, the plaintiffs were the owners of and in the possession of a certain gold-bearing quartz vein or lode situate in Tuolumne county, State of California, on Jackass hill, commencing at an oak tree standing about 50 yards southwest of the house now occupied by said plaintiffs and running thence in a southeasterly direction on said quartz vein 1,000 feet to a stake marking the southeast corner of the Carrington claim. Plaintiffs further state that they continued in the possession till July 13th, 1865, when the defendants entered upon 138 the aforesaid claim and ousted plaintiffs therefrom and that the said defendants have continued in the possession thereof up to the time of the bringing of this suit. Plaintiffs further state that the defendants are working said claim and extracting and carrying away the gold-bearing rock and earth therefrom to the great injury and damage thereof, and that they are wholly irresponsible and unable to respond in damages to these plaintiffs, so they have been informed and believe. Plaintiffs further state that said defendants are now in the wrongful possession of said claim and that plaintiffs are entitled to the possession thereof." I don't suppose there is any need of reading the prayer.

Mr. STREET: No. The complaint was filed September 14th, 1865.

Q. When you posted the notice on the Maximillian mine where did you post your notice?

A. I posted it on an old shaft which stood—I can't tell exactly—right across a little ravine on the south of where I was working. I only posted one notice. I don't remember whether I went up to the northerly end of the mine while I was working there or not. I had been around Jackass hill before posting my notice since 1864. I had been around there for a year or more. When I made the Maximillian location, I didn't find any notices, didn't find anybody working, nobody in possession, no tools, no fresh work there.

139 Redirect examination:

By Judge ROONEY: Mr. Page you became satisfied afterwards that Mr. Carrington had a right to the claim when you were informed so, did you not?

Objected to on the grounds that it is irrelevant and immaterial.

Objection sustained.

Exception noted. Exception No. 9.

Q. At the time Carrington came to you when you were working on the Carrington claim who came there with him, if any one?

A. Dick Stoker, William Gillis came with him the next time and some other party, I don't remember who.

Q. I will ask you to state what, if you remember was said by Carrington to you at the time William Gillis came there with him?

A. Well, sir; for a fact I can't exactly tell what was said, pretty near the same thing that was said the other time when he came the first time with Stoker.

RICHARD STOKER, called by defendants, testified as follows:

I have lived in Tuolumne county since February 1850. Since that time I have lived principally over there on the hill and 140 around Jackass hill. I knew Carrington from 1850. He left this county in the fall of 1870. He had some ground at Jackass hill and when he left he asked me to take charge of it and do the assessment-work. He didn't tell me there was two claims there. I worked on the—on what is both claims now, the Pine Tree and the Carrington, I did work on both of them, got gold on both of them. If I got any money to amount to anything I was to give him a portion. I had charge of the ground from the time Carrington left there till Gillis bought it from Carrington, I then turned it over to Gillis. I did not receive any notifications or instructions from Carrington to turn over the ground to Gillis. During the two years I was there I worked in a good many places prospecting around. On one spot, that's east of the pine tree, I got $140, and I took out 3 or 4 ounces out of the Carrington claim. No one interfered with my possession while I was in charge and I retained the possession till I turned over the ground to Gillis.

Cross-examination:

Carrington left in September 1870, I think. I was in charge of his property about two years till I turned it over to Gillis. Carrington did not leave any specific instructions with me about what kind
of work I was to do. He just told me to take care of the
141 property. I know at the present time the claims that are
known as the Carrington and Pine Tree mines. I know they are now known as separate claims. Carrington, when he left, he did not leave instructions with me to do work on the Carrington as a separate claim from the Pine Tree. I did not know at that time of the Carrington being separate from the Pine Tree.

Q. At that time when Mr. Carrington left you in charge of his property there was no such claim known alongside of what is now known as the Carrington as the Pine Tree claim?

A. Not to my knowledge, it might have been so, I didn't know it. I had no such information from Carrington. I did work on that mining ground which is now represented by these two claims as upon one claim. I intended the work to be done as on one claim. I think I posted notices on the ground. Nobody questioned my right to be there. I had no difficulty with anybody about keeping the possession. I don't remember whether I posted any notices on the ground or not. I think I put up some. I can't remember about that. Carrington had only two claims on the hill I think at that time, the Means claim, Mr. Gillis owns half of it, also had to take care of it and this Carrington and the Pine Tree as they call it. He left no one else in charge beside myself. I was friendly
with him when he lived there. I lived within a couple a
142 hundred yards from him. I was a daily visitor at his house.
He frequently spoke to me about his mining interests there. He talked to me several times about selling, wanting to sell. I remember of his speaking to me about his Carrington mine and about the Wilson & Means. They were the two principal claims on the hill at that time. I worked there just as it happened. There was one place I got this $140, I sunk down some 12 or 14 feet, that's the deepest hole I sunk there. I think I must have worked there 5 or 6 weeks. I could not specify any other particular place I worked; in prospecting you work a little while in one place and then shift

to another if you don't get a prospect. I would work there for a week or two sometimes, I worked just as I got any prospect. I did the work on the Carrington mine as though I would hold the claim. Also did the same on the Wilson & Means. I had charge of the property till some time in 1872. I think I had the ground in my possession for two years. I saw Carrington after he went away, he was back in 1871. I turned over the property to Gillis upon his telling me he had bought it. I took his word for it. He told me he had bought the claim. I can't say what he did towards taking possession. I don't know whether he worked on it or not. I have lived on the hill there since 1858.

143 Q. When did you first hear that vein on the Carrington that they now call the Pine Tree called the Pine Tree mine?

A. Well, I heard it called the Pine Tree vein, because the vein crops right by a big pine tree, as far as I know it was called the Pine Tree vein.

Q. Pine Tree vein on the Carrington ground?

A. No, not exactly that. I don't think I heard it called the Pine Tree mine, the Pine Tree vein is what I heard it called I think. That particular vein was distinguished in that way on account of the pine tree, on account of the cropping right under the roots of the pine.

William R. Gillis, recalled by defendants, testified as follows:

I knew of a man by the name of Louis Page working on the Carrington mine at one time.

Q. Did you ever have anything to do with reference to his working there?

Mr. Kalloch: We object to the question as incompetent and immaterial for any purpose, whether he ever had anything to do with Mr. Page working there is incompetent and irrelevant testimony in this case.

The Court: What is the purpose?

144 Mr. Street: I want to show by this witness that Mr. Carrington at one time when Page was working there and Page objected to leaving the ground upon which he was working, and said he did not propose to leave there because Carrington hadn't done the work on the claim, this witness showed to Page where within a month before he had worked upon the ground.

Objection sustained.

Exception noted. Exception No. 10.

Q. Mr. Gillis, you knew the time when Page worked there, didn't you?

A. I did. He commenced work there I think in May, 1865. Prior to his going to work there I had done work on the Carrington claim. I worked there for about three weeks before Page came to work.

Cross-examination:

I began work in May, 1865. I am sure about the month in my own mind. I am positive in my own mind that it was in May. If Mr. Carrington in his complaint says that Page commenced to work there on the 13th day of July, 1865, then I am mistaken about his commencing work there in the month of May, but I swear positively to this fact, we did the work there two weeks prior to the time Page tried to jump the claim.

Q. By what particular chain of reasoning are you able to swear to that date correctly now?

145 A. By this, when Page jumped the ground, Mr. Carrington asked me to go as a witness to notify Page that he was working on his ground. When we went there Page said You can't claim this ground because you hav'n't worked on it enough to hold it. It was then Carrington showed him the work in my presence; Carrington and I showed him where we had just quit work on the vein below him about 40 feet. I never knew Page had a notice on the claim, never saw one.

A. W. Stinchfield, called by defendants, testified as follows:

Q. Mr. Stinchfield, prior to the time of your buying the Pine Tree mine from Mr. Gillis you measured off the ground, didn't you, that you were about to buy from him?

A. We measured it off or stepped it off and established the boundaries or corners. I don't know whether we had a tape-line or just stepped it off. I know we were particular in establishing the corners and boundaries. We commenced to make our measurements from the southwest corner of the Atlas mine. We then measured westerly down along the line of the Atlas.

Q. How many feet did you measure along the line of the Atlas?

A. Down to the corner of the Pine Tree.

146 Q. Well, how many feet was it that you measured at that time?

A. We call it 171 feet, but were not very particular; Mr. Gillis and I were very friendly at that time; I never thought about any litigation and never employed any surveyor; we just established the corners and boundaries.

Q. Did you measure between the southwest corner of the Atlas mine and the corner that you established on the line of the Atlas mine?

A. Yes, we measured in some way; whether we did it with a rope I have forgotten now; we measured and established the corners. We called the distance 171 feet. We might have measured it with a tape-line or rope, or stepped it off some way. We established a corner and it has stayed there ever since. We next measured southeasterly; we might have had a tape-line or rope.

Q. Well, if you had a tape-line who carried it?

A. I think Mr. Gillis was ahead. At the northwest coner we established a mound of stones and a stake. Then we measured southeasterly 750 feet, more or less, to a stake and a mound of stone we

established. We then measured to a pine tree blazed on two sides; we measured to that tree 171 feet. I believe we called it 171 feet.
We didn't level it. Just measured right along; he was satisfied;
147 he said I could have that ground to that point, to that tree.
Then from the tree we measured, or followed along the line, to the point of beginning.

Q. Now, do you remember if you had a tape-line, the length of that tape-line?

A. Well I have two tape-lines, if it was either of mine, one is 100 feet and the other 50, it must have been one of these, it has been so long ago I can't swear positively. Gillis carried one end of the line and then I followed up with the other end to where he put down a stake. We measured in that way. I subsequently located the ground.

Q. I call your attention to the notice of location made by you and recorded January 21st, 1886, in which you say, commencing at a notice posted on a stake in stone mound, thence running in a southwesterly direction 66 feet to a stone mound, thence in a northwesterly direction 750 feet to a stake in a stone mound, thence northeasterly 61 feet to a stake in a stone mound in which a similar notice is posted, thence in a northeasterly direction 121 feet to a stake in stone mound, thence in a southeasterly direction 750 feet to a stake in stone mound, thence in a southwesterly direction 130 feet to the place of beginning, now hearing that notice read do you say you made that location in accordance with the deed?

148 A. I intended to put this notice at the northerly end of the claim directly over the Pine Tree vein.

Q. Where did you get that description?

A. In the deed. I might have stepped off the 66 feet running southwesterly from the point of beginning. I intended to locate the same ground that was contained in the deed. My intention was to locate or claim the same ground I bought from Mr. Gillis, and bounded it by these corners as we have described it, no more, no less. I did not establish any corners at the time of my location, but I put a post with rocks around it that the notice was on at the northerly end. I made the location the next day after getting the deed.

Mr. Street: I now offer the notice of location in evidence for the purpose of showing the date of the location, also for the purpose of showing the measurements and conflicts between the location and the deed, the witness has already stated that he located the same ground described in the deed, he has stated that he measured this ground with Gillis, measured that ground 171 feet in width at one end and the same distance at the other, I offer this notice of location for the purpose of showing the ground as located by him, two days subsequent to the time of making the deed, in accord as he says with the very ground deeded to him.

149 Notice of location admitted in evidence. (Location notice of A. W. Stinchfield set forth in the findings of fact.)

Witness continuing: I might have made measurements from the post where the notice was posted, one corner to the other, but the line between the corner next to the Carrington, Mr. Gillis and I marked the point, spotted trees, two oak trees and a stump, and that line marked out agrees with these corners.

The COURT: Are the trees there now on that line?

A. Yes, sir. I think I measured—put down a post over the Pine Tree vein as near as I could and then measured each way. Both at the northerly and southerly end of the claim. I don't remember if any one helped me to make the measurements. I can't remember that any one was with me at that time. I remember at the time I posted the notices, Mr. Gillen and Mr. Stoker were with me. Mr. Nicol wrote the notices, and left some blank spaces which I filled in myself. When Mr. Nicol wrote the notices I had not made these measurements nor established these posts. It was the distances at the northerly end and the southerly end that were left blank by Mr. Nicol, I think I filled them in myself.

Q. Now Mr. Stinchfield when you measured with Mr.
150 Gillis 171 feet to this monument and you had the deed, why
didn't you put in this in your notice of location, these measurements of this end line?

A. Because I didn't know on what place I would post this notice at the end. I didn't know what distance. My intention was to post the notices over the croppings of the Pine Tree vein. I didn't know at that time, so I measured it from over where I posted the notice.

Q. You measured correctly at that time did you?

A. Well, in fact I never did measure it very correctly, I don't think Mr. Gillis and I did, never had it surveyed till the suit.

Q. On the northerly end line you have a call 61 feet and another 121 feet, you measured it correctly enough to get it down to a foot didn't you?

A. Well, I know Mr. Gillis and I were not particular in measuring that line across there and we established the corner there with a line measured between what is now known as the Carrington and Pine Tree mine, spotted a tree.

Cross-examination:

When Mr. Gillis and I measured the boundaries of the Pine Tree claim we established a stake in stone mound at the northwest
boundary or corner of the claim. Mr. Gillis and I erected
151 it. Gillis did not object to the erection of the stake and stone
mound at that place, he assented to it. That monument has never been moved. That conforms with the tree we marked. I never saw it moved by anybody. It stands now right where we fixed it. We marked a line running southeasterly and established a corner, with a stake in stone mound. Mr. Gillis marked the spot, and we two put up the stake and mound there. No one else was present at the time. The mound is there now. I think Mr. McTarnahan, the surveyor, established a stake standing there at present in the same position. It is in the same identical place, always has

been, I know that as a fact. After establishing these corners I never moved nor caused them to be moved a hair's breadth.

Q. Now, between these two posts and along the boundary line between your claim and the ground reserved by Mr. Gillis did you and Mr. Gillis together fix any marks?

Mr. Street: I object, it is outside of any ground named in the deed or in the complaint.

Objection overruled.

Exception noted. Exception No. 11.

—. After you arrived at the northwest corner and went
152 down the line towards the southwest corner on the line between
the portion of the Carrington sold to you and the portion reserved by Gillis, did you fix any other monuments or establish any on that line?

A. We did, blazed two trees, oak trees, one a white oak and one a live-oak under which Mr. Rice sunk his incline. Then a stump beyond that. Gillis and I agreed to these three marks, two oak trees and a stump on that line. We spotted the trees with an ax, hewed the bark off. There was no one with us at the time. The live-oak tree stands 26 or 27 feet from the mouth of the Rice Incline No. 1.

The Court: When were these trees marked, Mr. Stinchfield?

A. Marked at the same time the corners were established. The corners marked upon the plat "Plaintiff's Exhibit B" represent the corners established by Mr. Gillis and myself. The tree designated on the plat as a white-oak tree 9 inches in diameter, is the white-oak tree on the boundary line, and is the point agreed upon by Mr. Gillis and myself. The tree indicated as a live-oak tree 12 inches in diameter is the oak tree Mr. Gillis and I agreed upon as being the boundary line. The stump is south of the live-oak tree. This
line between my ground and the ground reserved by Mr.
153 Gillis, and those two oak trees of which I have testified, and
the northwest corner and southwest corner monuments I have testified to, were shown by me and Mr. Gillis together to Mr. McTarnahan, the surveyor, when he made this plat. We both together told Mr. McTarnahan that these were the marks established by us together. In making that location I took as my initial point an object at the northerly end of my ground and another at the southerly end of the ground, approximately in the middle of the claim, midway between the sides. I measured or stepped from these two objects or points outwardly to each corner. At the northerly end of the claim I posted my notice on a post in a stone mound, put the notice in a box. We had no surveyor when Gillis and I measured off the ground, nor did I have a surveyor when I made the location.

Mr. Kalloch: What do you mean by saying you had written your notice in accordance with the deed, Mr. Stinchfield?

A. Well, I intended—I wanted to bound it the same as the claims adjoining. I intended to locate the same ground that Gillis deeded to me, I did not attempt to locate any more ground than Gillis had

deeded to me. Mr. Rice was not there at any time when we established the line. There was no one working in the Rice Incline No. 1 at the time. There was no windlass at the mouth of the
154 incline at that time. At the time Gillis and I agreed upon the white-oak tree near the Rice Incline no one else was there. There was no one working at the Rice Incline No. 1 at the time Gillis and I measured off the ground. Mr. Rice had worked there some, and his platform and I think his uprights were there, but the windlass wasn't there. Rice at that time was working on the Atlas. Mr. Gillis and I showed the lines and corners to McTarnahan, the surveyor, at the time he made the survey. We showed McTarnahan these same monuments and this same line, these same oak trees and this stump.

Redirect examination:

Mr. Gillis and I marked the trees on the boundary line; we did it with an ax or a hatchet. Gillis either marked the trees or told me to do it. Those trees were marked so those marks remained visible. If the court were over there they could be shown very easily on each of those oak trees, Mr. Gillis and I agreed upon these marks at that time as being the boundary line, and never had any dispute about the boundary line, always agreed to that. Mr. Gillis has ever since admitted my title to the ground within this line and the corner monuments. I have heard him admit and say it was my ground, that he didn't dispute the boundaries; I heard him say so during the last trial of this case. After showing Mr.
155 Gillis the ground I wanted to buy, Mr. Rice came along there and he was afraid Gillis was going to sell me some ground that would include the incline in which Rice had worked, the Rice Incline No. 1. Rice said to Gillis, Who is going to pay? Wanted to know which way we were running the line. Gillis told him south. Rice said that will take in this incline, it will debar me from working in that incline. Gillis said, Yes, if Warren and I make a bargain to sell this ground it will. Rice said, Who is going to pay me for this work here? Mr. Gillis says, You abandoned it, left it; he made some kick about working in there, and Gillis then said we will run this line along by the oak tree. I told him that would be satisfactory to me. At that time we established the line and marked it.

Mr. STREET: I now offer in evidence a deed of date the 4th of June, 1872, from T. E. Carrington to J. N. Gillis, deed found of record in vol. 16, page 564, of Deeds, Tuolumne county records.

Deed received and read in evidence, and is in the words and figures as follows:

This indenture made the fourth day of June one thousand eight hundred and seventy-two, between T. E. Carrington of the county of Tulare, State of California the party of the first part, and J. N. Gillis of Tuolumne county and State aforesaid the party of
156 the second part, witnesseth, That the said party of the first part for and in consideration of the sum of one thousand

dollars gold coin of the United States of America, the receipt whereof is hereby acknowledged hath bargained, sold, remised, released, conveyed and quitclaimed and by these presents doth grant, bargain, sell, remise, release, convey and quitclaim unto the said party of the second part and to his heirs and assigns forever all the right, title and interest estate, claim and demand both in law and equity as well in possession as in expectancy of the party of the first part in or to that portion, claim and mining right, title or property or in certain veins or lodes of rock containing precious metals of gold and silver and situated in the county of Tuolumne, State of California and described as follows, to wit: Being the undivided one-half (equal to 600 feet) of the Wilson & Means mine, and an undivided one-half (equal to 300 feet) of the Stoker mine, and one-third of the New York mine, and one-third of the Chilano mine, and the whole of (being 1,000 feet) the Carrington mine. Also the house and garden thereto belonging all of which mines are situate lying and being in district No. 2, on Jackass hill in said county of Tuolumne, State of California. Together with all the dips, spurs and angles and also all the metals, ores, gold and silver bearing rock and earth therein and all the rights, privileges and franchises thereto incident, appendant and appurtenant or therewith usually had and
157 enjoyed, and also all and singular the tenements and hereditaments and appurtenances thereto belonging and the rents, issues and profits thereof, and also all the estate, right title interest, possession claim and demand whatsoever of the said party of the first part of in or to the premises and every part and parcel thereof. To have and to hold all and singular the premises with the appurtenances and the privileges thereto incident unto the said party of the second part. In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

T. E. CARRINGTON. [SEAL.]

Duly acknowledged and recorded June 18th, 1872.

JAMES N. GILLIS, called in his own behalf, testified as follows:

I am one of the defendants in this action. I first came to Tuolumne county in the spring of 1856. I resided from 1856 to 1858 at Jackass hill; then I left and returned in 1862. I then resided at Jackass hill till 1880. I became acquainted with a man by the name of T. E. Carrington in 1856. I became acquainted with what is known as the Carrington mine in 1857. I was acquainted with the mine in '57 and '58; then I went away in July and came
158 back in '62. While away from '58 till '62 I was on my ranch in Sacramento county. From '56 to '57 I knew the boundaries of the Carrington mine. I became acquainted with the boundaries by reason of the trouble that took place—a miners' meeting on the hill in 1857. I was a member of that meeting. That meeting was about some trouble that had arisen about the Santissimo mine. It was at that time I became acquainted with the boundaries of the Carrington.

Q. What was there marking the boundaries?

A. A stake on the road leading to the west. Stake by the side of the road; that's another line, that's the north line, and just below, very near 1,000 feet, was a big pine tree; the body of the tree is there yet and the stump. I saw a notice posted on an oak tree. The Carrington claim was 1,000 feet in length and 100 feet in width on each side of the vein. When I returned to Tuolumne county in 1862 I came direct to Carrington's house the day I got on the hill. I boarded with Carrington in '62 for 3 or 4 months, and the whole of 1863. I also again became acquainted with the Carrington mine. During the years '62 and '63 Carrington worked on the Carrington mine and I worked on it. When I returned in 1862 I also became acquainted with a mine on the east side of the Carrington, the Pine Tree mine. I prospected on it and carted
159 the top of the vein off. I did not become acquainted with only one boundary of the Pine Tree mine to know well till '67, that's what is called the northeast corner. I knew the side line between the Pine Tree mine and the Carrington mine. I knew that by that Tyree shaft. I saw one notice on the claim, it was posted on a pine tree. I don't remember the contents of the notice except that it claimed 300 feet, I don't know what the side lines was, it was claiming 300 feet in length. Carrington left Tuolumne county in the fall of 1870. I saw him in '71. He was at Jackass hill. When I bought out Carrington, I went to his house in Visalia to transact the business. I went there on purpose to buy the property. The Wilson & Means mine spoken of in the deed from Carrington to me lies to the east of the Pine Tree mine. The Stoker mine lies almost due north of the Pine Tree mine. The New York mine lies almost west of the Stoker mine. The Chilano mine lies south of the Carrington and Pine Tree mines. The whole of the Carrington mine being 1,000 feet is the Carrington mine I have just spoken of. I did not get a deed of what was called the Pine Tree mine.

Q. By that deed which you got from Carrington, I will ask you if it was your intention to purchase all of the property he had on Jackass hill?

160 Mr. KALLOCH; We object to that on the ground that it is improper, incompetent, irrelevant, and immaterial, the testimony would be, as to what this witness' intentions would be in purchasing this property, this deed speaks for itself, what he bought.

The COURT: I don't understand that the court is called upon to construe any language in this deed or the intention of the party, what he intended to convey or what he intended to purchase; of course, Mr. Gillis can show when he went into possession of the Pine Tree mine, what he did upon it, what acts of ownership he exercised over it; as far as what he intended to purchase I think that is immaterial, that would not show title. The objection is sustained.

Exception noted. Exception No. 12.

The COURT: Of course he can show when he went into possession of it, and his acts in reference to it.

Q. Mr. Gillis, in 1872, did you make any agreement with Carrington in reference to the Pine Tree mine?

Mr. Kalloch: That is objected to unless it is shown to be in writing.

161 Judge Rooney: We propose to show that we intended to buy all of Carrington's mining property in the county, we paid him for it and went into possession of it.

Objection sustained.

Exception noted. Exception No. 13.

Q. After you got this deed from Carrington what property on Jackass hill did you go into possession of?

A. The Carrington, the Santissimo, the Pine Tree, the Stoker, the New York and the Wilson & Means mines.

Q. Will you state the circumstances of your going into possession of the Pine Tree mine at that time?

A. I went to it as I had a right from Carrington, as I had derived title from him.

Mr. Kalloch: We move that be struck out "as I had derived title from him."

Motion granted.

Exception noted. Exception No. 14.

162 Mr. Street: May it please the court, in order that we may have no further discussion upon this question of the title to the Pine Tree mine, I desire to offer to prove certain facts so the matter can be passed and stop this branch of the case. I now offer to prove by this witness that at the time he got the deed from Carrington that has been read in evidence, that it was the intention of the parties, Gillis to purchase and Carrington to sell, all the mining property owned by him in Tuolumne county—that is, the mines as described in the deed, and also the Pine Tree mine and the Santissimo mine that is not in the deed itself; that the witness Gillis returned from Tulare county thinking he had in consideration of the $1,000 paid by him to Carrington obtained title to the Pine Tree mine, together with the other mines described in the deed, and that Carrington intended to convey to Gillis the Pine Tree mine for that consideration, together with the other property described in the deed. That the witness came to Tuolumne county from Tulare county and took possession of the Pine Tree mine and the other mines described in the deed as the owner thereof, thinking he had purchased the Pine Tree mine with the others, or knowing that he had purchased the Pine Tree mine with others and thinking it was included in the deed.

Mr. Kalloch: Does the counsel now offer to prove that is a part of the original conveyance by Carrington to Gillis? I don't understand that the offer includes anything of the kind.

Mr. Street: No.

163 Mr. Kalloch: We object to the offer upon the ground that the testimony sought to be elicited would be incompetent, irrelevant and immaterial, and that it is not competent or

proper for counsel to prove by this witness the conveyance from Carrington to himself of any property, any real property in this county at the time stated or any other time, excepting by a written instrument, and that it is immaterial to show what the intentions of Gillis or his grantor Carrington were at the time of the execution of the deed as against the plaintiff in this action.

Mr. STREET: We offer to prove by this witness that Carrington did sell and Gillis did buy the Pine Tree mine and that it was omitted from the deed by oversight or mistake on the part of Gillis and Carrington.

Mr. KALLOCH: Is this offer substituted for the other?

Mr. STREET: No; in connection with the other.

The COURT: As far as counsel desires to show when Gillis went into possession, of course he is entitled to show that, and all the acts of Gillis when he went into possession. If they desire to introduce evidence that the mine was included in the deed, that they intended that common name given to it was to include the Pine Tree mine, the court will receive the evidence; otherwise the objection will be sustained.

Exception noted. Exception No. 15.

164 Q. How long after getting the deed was it that you went to Jackass hill and took possession of the property?

A. Just as soon as I could come up; maybe a week or ten days. As soon as I came up I went to work on the Pine Tree mine so it wouldn't be interfered with. From the time I bought the property till the time I sold the Pine Tree mine to Stinchfield I leased it out to various parties, allowed them to work it on shares; did the assessment-work on it when I could not lease it. As I have stated before I knew where the northeast corner of the Pine Tree mine was, where the compromise was made by William Waters and Mr. Carrington in 1867. The pine tree was standing at the time I took possession of the claim in 1872.

Q. Now, you have stated that you knew the boundaries between the Pine Tree mine and the Carrington mine?

A. I knew the side line. I didn't know the boundary. The Pine Tree is probably 150 or 200 feet shorter than the Carrington. The original Carrington extended 1,000 feet in length.

Q. Now, was the northerly end line of the Pine Tree a continuation of the northerly end line of the Carrington?

A. No, sir; it may be 200 feet shorter. If the Pine Tree 165 mine had extended eastward of the Carrington, Mr. Waters could not have got that ground.

Q. If the northerly end line had been extended eastwardly on the Carrington, how far would the northerly end of the Pine Tree mine be from that line?

A. Would be all of 200 feet, maybe more.

Q. State what you did at the time you measured off the ground which you conveyed to Stinchfield.

A. I told him what ground I would sell. Warren went into his cabin and got a 100-foot tape-line, we went down to this gulch where

I made a mark, he took one end of the tape-line and I took the other end. I was ahead and measured 100 feet from this mark I made, I stopped at this one hundred feet and measured 71 feet to the southwest corner of the Atlas.

The COURT: I don't understand that this evidence is offered in any way to contradict the deed in any shape, only to show a movement of the monuments.

Mr. STREET: That's the point.

At the northwest corner of the ground to be conveyed I made a mark with my foot. I told Warren how to commence, I told him there was the ground he could buy.

The COURT: You made a mark on the ground?

166 A. With my foot, I am not certain whether we put a stake down or not, I think we did, I am satisfied we measured from that point, put a rock there.

Q. You there piled up some rocks, you are not sure whether you drove a stake down or not?

A. I think there was a stake there; yes, I am not satisfied in my own mind, I think there was a stake there.

Q. Now, the measurements you made, will you state whether it was an exact measurement of 171 feet from the pile of rocks to the southwest corner of the Atlas mine?

A. When that 100 feet run out—it was one of these tape-lines had 100 feet, it run out and I stopped there, I put the line down and had Warren come up, he came up and put the other end there and we went out till it was 71 feet. The rest of the ground we stepped off. We stepped off about the middle of the claim, went down to the pine tree blazed. We put up a monument at the southeast corner. I don't think we made any measurements at the southerly end of the ground, I told him we would make it more or less for that ground measured and make a parallel end line and call it 171 feet and we did so. We measured the northerly end line 171 feet and stepped it off southerly 750 feet more or less, I told him that line goes more or less. We agreed that the ground should be 171 feet in width at the southerly end. It was not my intention to convey to Stinchfield any greater portion of ground than that which is contained in the deed. We made these measurements so I could give him a deed. No portion of the ground which I conveyed to Stinchfield was any portion of the original Carrington claim as located by him in 1854. At the time we run the line southerly from the northwest corner of the ground conveyed to Stinchfield I didn't mark any trees, nor do I recollect of Stinchfield marking any trees to designate the side lines of the ground. I know I didn't mark any trees for that purpose. I am certain I I didn't have either a hatchet or ax with me when we measured and stepped off the ground. I don't think Stinchfield had one. After the deed was made to Stinchfield I don't know whether I went back to the ground or not. Within four or five days from that time I went to San Francisco, and I did not come home until after the 18th of March. I was not living at Jackass hill at that time. I 167 went up to live in the old Carrington house in May or June, 1886 I have seen the monument on the northwest corner of the Pine Tree mine as it is now.

Q. I will ask you if that monument is at the same spot that you measured from when you made that 171 feet from the northwest corner to the Atlas mine.

168 A. I don't think it is, sir, I am pretty certain it has been moved some way or got out of place. I think so, because I measured the ground, and I think that calls for more ground than I measured.

Q. Were you acquainted with F. B. Rice, one of the defendants in this action, now dead?

A. Yes, sir. He went to work on what is called the Rice vein, Carrington vein, I think in 1885, either May or June.

Q. Under what term or conditions did Rice go to work upon this Rice vein?

A. Upon a verbal lease. He was to give me one-quarter of the gold he took out. He had the privilege of working there five years. The Rice lead has its apex on the Carrington claim. The Rice vein lies to the east of the Carrington vein on the Carrington claim. I think the veins are 50 or 60 feet apart. They run parallel northwest and southeast and both dip easterly. Upon the ground I conveyed to Stinchfield there is one vein called the Ray vein, west of the Pine Tree, and there is another on the other side called the Stoker. Pine Tree vein lies between the Ray vein and the Stoker vein. There is another vein, I do not know the name of it. The Pine Tree vein is 60 feet east of the Rice vein. The Ray vein is about 40 feet east of the Rice vein. These veins on the Pine Tree mine, the Ray, the Pine Tree and the Stoker, run northwest and southeast
169 and all dip to the east. On the Pine Tree claim there is also one vein called the west vein; it runs nearly northeast and southwest, running transversely across these veins and then across my veins on the Carrington ground. At the time I sold to Stinchfield, Rice had worked down upon the Rice vein something over 30 feet. His incline was sunk on three veins; they lie parallel; I think 8 or 9 feet would be the distance that would take in these three veins. That is from the hanging to the foot-wall. There is the hanging-wall vein, the foot-wall vein, and the middle vein. The middle vein is right on what is called the hog's-back. These three veins in Rice Incline No. 1 all apex on the Carrington mine as originally located. At the time Stinchfield and I measured off the ground that I sold him, Rice came from the direction of his incline, and he came up to us very much excited and said, You are going to sell my ground. I told him no, I was not going to sell his ground; I would reserve his ground for him; we had a talk and I satisfied him; I said, You have got a lease and Stinchfield has got a lease, and I propose to sell this ground to Stinchfield. After a while we decided upon this tree, and that Stinchfield's ground, his westerly boundary, should not go beyond that oak tree. We fixed that tree there. He wasn't to go by that tree. That tree had nothing to do with the measurement

170 of the ground I sold to Stinchfield. That tree is not on the
line established by me and Stinchfield. Mr. Stinchfield and Rice were bad enemies, had been for a long time before. The ground I spoke of to Rice as having leased to Stinchfield was the Pine Tree vein. Stinchfield had been working that vein and that Pine Tree mine under a lease from me since 1881. He had a lease of the Pine Tree vein and Pine Tree mine at the time I conveyed to him. After I made the conveyance to Stinchfield Rice continued to work in his incline. He continued to work there up to 1888. John Voss also worked with Rice in 1888. Rice and Voss came to me and Rice asked me if I had any objections; I told them no, I had given a lease to Rice and they could both hold and give me a quarter. Voss continued to work with Rice up to the time he quit in 1888. I was not down their works very frequently while they were working there. I think I went down two or three times. They were continually after me to go down, I wouldn't go. I was down when they were getting gold. I was down in No. 2 incline and worked there half a day. Rice had reached the gold. It was in the east vein which apexes on the Carrington. The west vein had not made its appearance yet. I was also down Rice Incline No. 1, I saw some gold in the middle vein. The west vein and the middle vein intersected in the excavation made by them. I think that
was in the month of June, 1888. I didn't go in there
171 only once or twice, I don't know only what I saw, I am not
very certain about that testimony, I know I saw gold in the vein. I was down there when they broke through into Stinchfield's works. Rice sent William Swearer for me. I went down and spoke to Warren and told him to get off my vein, you are on my ground. Stinchfield and the Thompson boys went back and Rice says don't talk to Jim, I will settle that. I says go down and fix it or I will bring suit. Rice didn't want me to go down, he would settle it. I didn't know, he was excited, he was a very excitable man, he said he could settle it. I said all right, if Stinchfield would go back all right. I did not go back down in the mine after that for two or three weeks, I then went down to the line where they broke through, it was bulkheaded by some rocks thrown up. The bulkhead I don't think was more than 4 feet off Rice's vein to the east of it. I didn't see very little of the bulkhead because the dirt was packed in at that place.

Mr. STREET: Did Mr. Stinchfield, during the time that Rice and Voss were working there on that ground and after you conveyed this claim to Stinchfield, say anything about your working there?

A. On the Rice vein?

Q. Yes.

172 A. Why of course he spoke to me about their working
there, he said he couldn't find out where they were working, he stated it to me several times, he said he could hear them striking down there.

Q. What did he say at these times?

A. Nothing, only that.

Q. Couldn't tell where they were working?

A. Asked me for permission to go down and I told him I was willing, to go and see Rice. Rice—I don't know whether Stinchfield had any hard feelings towards Rice or not; Rice was very hostile towards him all the time, he did not like him.

—. He never made any objections to *to* you about Rice and Voss working there?

—. Stinchfield never made any demand on me for any of the money that may have been taken out by Rice and Voss. Stinchfield never came to my place and said that Rice and Voss were working on his west vein and that he had bought the mine from me and that he didn't want them to work there. I don't think he was ever in my house; I didn't like him very well and he didn't like me about that time; we met on the claim and spoke; he seldom ever came to my house; as I stated before when I leased to him he used to come often there, that was before I sold it.

Q. Did you ever have a conversation with Stinchfield at the mouth of Rice's incline, wherein he spoke to Voss in your
173 presence telling Voss he didn't want them to work on his west vein?

A. No, sir; I hav'n't any recollection of any such conversation at all.

Q. Now, Mr. Gillis, at any time while Rice and Voss were working there upon that claim, state if you told Stinchfield if I take any gold out of that claim that belongs to you that he should have it, that Stinchfield should have it?

A. I did not.

(Permission by the court being given the following question was asked:)

Q. Mr. Gillis, will you state whether or not it was the intention of both yourself and Mr. Carrington to have inserted in that deed which you obtained from Mr. Carrington in 1872, the Pine Tree mine, and that the Pine Tree mine, the description thereof, was omitted from that deed by mistake?

Mr. KALLOCH: We object to that on the grounds heretofore stated in objecting to the same and similar questions and that it is incompetent, irrelevant and immaterial.

Judge ROONEY: We desire to prove by the witness that he entered into an agreement with Mr. Carrington to purchase the mine in controversy, together with other mines, and that he did pur-
174 chase all the property, including the mine in controversy, and that he went into possession of the mine in controversy under the deed and supposed that the deed contained the Pine Tree mine; afterwards he improved the mine, expended money on it and held possession of it and sold it to Stinchfield, the plaintiff in this action, who went into possession of it and improved it and expended money on it. Now the question that was argued here before when this matter came up was that we could not show that the property had been conveyed because it was not contained in writing. That brought up the question of a verbal sale, whether

you could convey real estate by verbal sale or not. The facts here what we expect to show are that Gillis got an equitable title to the land in controversy under an agreement with Carrington; that he went into possession under that deed, and that deed and what equity gave him perfected the title to the land in controversy, such title as would enable him to defeat an action in ejectment.

Objection sustained.

Exception noted. Exception No. 16.

Q. Mr. Stinchfield has testified in reference to your stating to Mr.
Nicol, when the question was asked as to what the piece of ground
conveyed should be called that you said, "We will call it the
175 Pine Tree mine." Did you make such a statement?
A. No, sir, Warren Stinchfield called it the Pine Tree
mine, I said nothing.

Cross-examination:

I only worked a half a day with Rice in the mine. That's all the work I ever did with him after I leased him the ground. In that half a day I took out $30, might have been a little more or less. That's all the gold I ever assisted Rice and Voss in taking out. When we established the northwest corner of the Pine Tree mine, Stinchfield and I, we commenced in a little gulch there at the northwest corner of what is known as the Pine Tree mine, and measured 171 feet with a tape-line; Warren carried one end and I the other. Before we commenced I drove down a piece of plank and put some rocks about it; then we measured from that corner to the southwest corner of the Atlas 171 feet. That is at the same time the northeast corner of the Pine Tree mine. Then I told Warren, this side line we will take straight across and step it off more or less.

Q. You claim that the northwest corner monument of the Pine Tree mine has been moved?

A. Mr. Kalloch, I don't see how it could get away from that 171
feet. I claim it has been moved. We measured 171 feet there
and made no mistake. I was present when McTarnahan,
176 the surveyor, made the survey at my request, for the purpose
of making a plat for the last trial. Stinchfield and I showed
him where the northwest corner of the Pine Tree mine was. We showed him the marks placed at the northwest corner. After he measured I told him, the surveyor, that that monument had been moved; I said it was further over west than when I put it there. I told the surveyor to run that line from that corner to the southeast.

Q. You recollect that you and Mr. Stinchfield and several other persons were there and Mr. McTarnahan put some nails in an oak tree and stump, between the Pine Tree and Carrington?

A. I remember it.

Q. The line run through this point, did it?

A. Yes, sir.

Q. That's the line you and Mr. Stinchfield told him to run?

A. Yes that's exactly where it run to. The distance surveyed

across the northern boundary of the Pine Tree and Carrington mines was something over 800 feet. I don't know whether that is the correct distance or not. I know the distance we stepped. I do not know how far it was from the northwest corner of the Pine Tree to the northwest corner of the old Carrington; I can't say posi-
177 tively how far it was. I never measured from the northwest
corner of the Pine Tree mine which I sold up to the northwest corner of the Old Carrington, along on the northerly line of the ground I reserved. I located that ground the day after I sold to Stinchfield the Pine Tree mine.

Q. In that notice of location you posted didn't you describe that line as being 262 feet northwesterly from the northwest corner of the Pine Tree mine to the northwest corner of the Santissimo mine?

A. Let me read it, please. It is my writing. I don't remember specifying that boundary. I have no recollection about having done it; my recollection of making it is I didn't measure at that time, I didn't measure my ground at all; it was never measured till the surveyor came there and measured it; I don't, didn't know the distance at all after I sold him that. I located the Carrington the day after I sold to Stinchfield.

Q. I show you a document reading as follows: The undersigned has this day, January 18th, relocated the Carrington mine situated upon Jackass hill bounded as follows, running 262 feet northwesterly from the northwest corner of the Pine Tree mine to the northeast corner of the Santissimo mine, thence southeasterly 750 feet to a stone mound, thence easterly to the southwesterly corner of the Pine Tree mine, thence 750 feet to the place of beginning, said
178 mine being known as the Carrington mine, bounded on the
north by the Atlas mine and on the west by the Santissimo mine and on the east by the Pine Tree mine. James Gillis. Recorded at the request of J. Gillis, January 19th, 1886, at 25 m. past 2 h. p. m. in Book I, vol. 4, of Claims, page 68, by J. F. Wagner county recorder, by R. Inch, deputy recorder. Now having heard this document read and having it shown to you can you state whether or not — is the notice of location which you posted and had recorded after you sold and deeded to Mr. Stinchfield?

Mr. KALLOCH: All I am trying to get at in the world is that measurement of 262 feet; I want to know how this witness established that line as 262 feet.

The COURT: Of course anything the witness did with reference to the monuments is admissible in cross-examination, showing where they erected the monument, showing whether it has been tampered with, showing whether it is in the same place it was when he made it; for that purpose it is admissible.

A. I want to state from the beginning all about this. I want to state that the Carrington mine, I never measured it, never even knew the breadth of it when I sold to Stinchfield. It was
179 on the 15th Warren Stinchfield came to me to buy the Pine
Tree mine. I made an appointment to meet him on the 16th.

We met on the 16th, went up and made all the measurements, we drove the stakes and everything; that night on the 16th, I posted my notices between 7 and 8 o'clock, possibly might have been as late 9 o'clock. The next day I came over here with him and the deed was made to him. Then I went to the recorder's office and had my notice recorded. When I posted that notice I never knew the length of the claim when I sold it to Stinchfield, because I had made no measurements, I never made any measurements. I just simply bounded the claim by the Pine Tree, the Santissimo and the Chilano mines.

Mr. Kalloch: I now offer the notice as recorded in evidence.

Q. Refer to the following words on the third line of the notice, "running 262 feet northwesterly from the northwest corner of the Pine Tree mine to the northeast corner of the Santissimo mine." Where did you get that measurement, 262 feet?

A. I don't know, unless I stepped it off; I have no recollection of making that measurement.

Q. How did you come to make that definite statement in your notice of location that your northerly line marking that claim was 262 feet long?

180 A. I don't know: I bounded it by the Pine Tree mine and the Santissimo, to the best of my recollection. I haven't the least recollection how I came to get as accurate a statement as that in my notice of location. When McTarnahan made the survey of the mine for me for the purpose of being used at the last trial of this case I showed him the northwest corner of the Carrington mine. I also showed him the northwest corner of the Pine Tree mine and the corner of the Atlas mine; he measured from that I think. I did not know that the measurement of the northerly line of the Carrington mine was some 61 feet more than I claimed in my notice. Under my new location I took in all the ground lying between the Pine Tree mine and the Santissimo. I told the surveyor where my old line was 100 feet on each side of the vein.

Q. How did you find the distance as described in this notice of location: "Thence southeasterly 750 feet to a stone mound"?

A. Why the stone mound has been there for years; the 750 feet more or less was just as I stepped it off with Stinchfield when we measured his ground. That run right down to the corner of what is called the "Santissimo mine" owned by my brother and Mr. Harriman. I run down the line dividing between us. I put it 750 feet because the Waters mine (Atlas) cut off part of the
181 Carrington in 1867, when they had their difficulty there,
Carrington and Waters; I didn't measure it; I simply took it more or less. It has never been surveyed except by Carroll McTarnahan. I told Mr. McTarnahan when he made the survey for me of the northwest corner of the Carrington. I told him distinctly this old monument, 100 feet on these sides, and then he run off over to the stake where the mill site of the Atlas mine is. I also showed him the corner common to the Carrington and Pine Tree, that would

be the northeast corner of the Carrington and the northwest corner of the Pine Tree; I showed him a corner established by a mound by myself and Mr. Stinchfield. I own that ground. I took McTarnahan to the northwest corner of the Pine Tree mine, then I run right along the Atlas line till I came to where my 100-foot stake was on the other side; when I got there I drew his attention to it and said there is where the old corner used to be; now I wanted to take in this ground ahead. The Carrington mine is 100 feet in width on each side of the vein. I don't know how many feet he run; his map will show that. I have known for about 10 years that the Santissimo did not come up to the west side line of the Carrington. I knew the old boundaries of the Carrington at the time McTarnahan made the survey. I dug it up. In the court
here, I got to thinking after the first trial of this case about
182 Louis Page, and then everything came back to me. I know
where the boundaries were before the last trial.

Q. Didn't you testify at the trial of this case before that the portion of the ground you sold to Mr. Stinchfield was a part of the old Carrington?

A. Yes, I go back on that; I testified under a misapprehension of facts; I had forgotten about everything I testified here, it is so long ago.

Mr. KALLOCH: At the former trial of this case, when you testified on July 25th, 1890, Friday, was the following question asked you: "This mine, the Pine Tree mine you sold to Mr. Stinchfield, was a portion of what was called the Carrington mine, was it not?" And you answered, "Yes, sir"?

A. I did.

Q. Were you then asked the question: "That which you now hold as the Carrington mine and this Pine Tree mine for a long time had constituted what was known as the Carrington mine?" And did you not answer to that question: "Yes; they constituted the Carrington mine"?

A. I did, sir.

Mr. KALLOCH: Mr. Gillis, when did you first remember that the Pine Tree mine that you sold to Stinchfield did not constitute a
part of the old Carrington mine?

183 A. I got to thinking after that trial was over, and it came
into my head about the lawsuit Carrington had with Page, I then got to reviewing my life from '56 up and I then remembered about the Pine Tree and Carrington. At the time I sold to Stinchfield I did not remember it. I knew it was called the Pine Tree mine. I had been in possession of the property so long I had forgotten about it. I never told Stinchfield about the Page suit. I never thought about the Page suit until this last trial was over.

The COURT: In former years, Mr. Gillis, did the Carrington formerly cover both mines?

A. No, sir; I could tell you now, I can make a total and detailed statement of the whole thing, from the time I arrived on the hill. I had forgotten all about these mines when I went to trial. I was not prepared, I was fighting that little crossing — went through both mines. I simply called both mines the Carrington. I had forgotten everything, but the Pine Tree mine has been known as the Pine Tree mine by everybody, called the Pine Tree mine.

Mr. KALLOCH: You mean the Pine Tree mine or the Pine Tree vein?

A. Pine Tree mine and Pine Tree vein both, I think under the name of the Pine Tree mine. I don't think I testified at the last
trial that the lease I gave to Rice was for five years. I knew
184 it would hurt me if I testified I gave him a lease for five
years. Mr. Rice threw up the lease in 1888. Voss quit a
little before Mr. Rice quit. Prior to the last trial and prior to my thinking of the Page suit, everything had gone out of my memory.

Mr. KALLOCH: Mr. Gillis, how far does the Carrington vein crop from the line which you and Stinchfield established as the boundary line between your claims?

A. I don't know, sir, I don't know the exact number of feet.

Q. Did you testify at the last trial of this case as to the number?

A. No, sir, I did not.

Q. On Wednesday, July 23, 1890, at the former trial of this case, were you asked by Mr. Street: "Upon the vein where it was worked by Rice and Voss, what vein was that?" and did you answer to that question: "The Carrington"?

A. Well, it is called the Carrington.

Q. Did you answer the question in that way?

A. Not to the best of my knowledge I did not.

Q. Were you then asked by Mr. Street the following question: "Where did that vein crop?" and to that question did you answer: "About 27 feet from the line"?

Mr. STREET: Before the witness answers these questions I
185 submit it is proper for the counsel to show the testimony to
the witness and let him examine it before he questions him
upon it.

The COURT: That's proper.

Mr. KALLOCH: I now show you your testimony taken at the former trial of this case, contained in volume 1 of the stenographer's record of the transcript, commencing at page 1, and I call your attention specifically to the cross-examination on page 4 of the testimony, to read it over, and then I will question you concerning it. Have you read the cross-examination?

A. Yes, sir.

Mr. KALLOCH: Now, having had your attention called to your cross-examination, can you state whether you stated to your counsel during that cross-examination that Rice and Voss were working on the Carrington vein and that that vein cropped about 27 feet from the line of the Pine Tree vein?

A. Well, that's a misapprehension of facts, the Pine Tree vein is 60 feet from the Rice vein. I did so testify, but it was a false statement and I didn't know it; it was not called to my attention; the Carrington vein is fully 50 feet from it, on the other side, 40 or 50 feet at least from the Rice vein.

186 Q. Didn't you say in your cross-examination that Rice and Voss were working upon the Carrington vein, being the Rice vein?

A. Being the Rice vein, I said it of course; I own up I said everything that's there.

Q. When you spoke of its being 27 feet from the line, did you mean the Rice vein was 27 feet from your line and Stinchfield's?

A. I meant Rice's.

Q. You meant Rice's vein was 27 feet from the line between your ground and Stinchfield's?

A. Yes, sir.

Q. What line was that?

A. That's the oak tree where I told Rice he should not go beyond.

Q. Was that the line you and Stinchfield had agreed upon as the line between your mines?

A. That's the line there at the oak tree. I told Rice that Stinchfield should not go west of that oak tree; but that's not the ground I deeded him, because I deeded him 171 feet. The ground over there is pretty rough to make measurements upon.

Q. This line that you say Rice's vein cropped 27 feet westerly from was the line extending from the corner which you and Stinchfield established at the northwest corner of the Pine Tree down through this oak tree and stump?

A. No, sir.

187 Q. What line was it then?

A. I made no line, just stepped back to this oak tree.

Q. That's the only line you made?

A. Yes, sir, and when the surveyor came there and took the line I told him the line run through there. I said, "Here is the monuments." Whether he drove nails I don't know. I told him to measure from the point, from the northeast corner; I told him there is the boundary; he run that line himself. I showed him the northwest corner of the Pine Tree; I didn't show him any oak trees. I have a remembrance of seeing the oak tree. I was with him when he run the line.

Q. You saw him put nails in that oak tree?

A. I don't remember the nails; I remember he put something in the oak trees. I told him there was the monument. I never saw him put anything there. I have an indistinct memory that he did; he might have put something else there. I don't know what it was. At the former trial of the case I testified that I had known the Carrington mine since 1856, that I bought it from Carrington in 1872 and had a deed for it; also that I didn't know that Carrington ever made a location of that claim by his marks and boundaries of the claim; that I had looked to see if any notice of location of the Carrington claim was contained in the records of this county
188 and that I could not find any.

A. You also stated, didn't you, that after deeding a portion of the Carrington claim to Stinchfield you made a location upon the remaining portion of the Carrington claim, did you?

A. Yes, I stated that too.

Q. Did you also testify in that case: "I don't deny the line Mr. Stinchfield has, I sold him the property and I don't deny the line"?

A. Yes, sir, I testified to that too; also that Stinchfield and myself established a line between us, and that I made a location of the Carrington claim after deeding to Mr. Stinchfield, and that I put up the four corner posts and monuments, and that I posted notices at each end of the Carrington, and that my object in location was to comply with the law as I hadn't found where Carrington had located, and I thought Stinchfield might locate it or anybody else I think, not him in particular, and I wanted to be on the safe side. I also testified.

Q. Was the testimony you gave and concerning which I have just questioned you true, Mr. Gillis?

A. Some of it was and some or it was not. I had forgotten it.

Q. I call your attention now to your testimony contained
189 in volume 3 of the record of testimony taken at the former
trial of this action on Friday, July 25th, 1890.

(Witness examines testimony.)

A. I testified to the whole of that, but there is a misapprehension there.

Mr. Kalloch: There is a half a page, I will read it and let the reporter take it down (reads): "J. N. Gillis recalled, examined by Mr. Kalloch, testified as follows: Q. This mine, the Pine Tree mine, you sold to Mr. Stinchfield was a portion of what was called the Carrington mine, was it not? A. Yes, sir. Q. That which you now hold as the Carrington mine and this Pine Tree mine for a long time had constituted that mine known as the Carrington mine? A. Right where the Pine Tree is, there used to be a big pine tree—— Q. (Interrupting:) This mine you sold to Mr. Stinchfield and the mine you retained, the Carrington, these two together constituted the Carrington mine now owned by you? A. Yes, sir, they constituted the Carrington mine. Cross-examination by Mr. Street: Q. This ground you sold? A. The whole of it. Q. Of the two mines together? A. The 480 feet I had on the other side of this right where the blacksmith shop is, the Carrington is marked on the plat, the pine tree is
on the verge, the extreme edge, and this Pine Tree vein
190 cropped under this pine tree. Q. That's the way it got its name
the Pine Tree? A. Yes, sir. Q. And this ground to the
east? A. That's over on the Wilson & Means. Mr. Kalloch: East from the Carrington? A. Mr. Stinchfield is sandwiched in between me and the Wilson & Means; I sold about 90 feet of the Wilson & Means and about 33 feet of the Carrington I think it is. Mr. Street: Took a portion of the Carrington and a portion of the Wilson & Means? A. Yes. Q. The Pine Tree vein itself was a portion of the Carrington claim? A. That's upon the extreme boundary, the other side here; it was called the Pine Tree from this pine tree; it was called that by everybody."

Q. Now, Mr. Gillis, how long after the decision by Judge Rooney which followed the former trial of this case and from which the plaintiff appealed, was it before you recollected of a separate Pine Tree vein?

A. A very short time afterwards I remember talking to my brother Billy; he said didn't you know better than that it was the Pine Tree mine. That was some two or three months after the decision. It was right after the trial I found out all my testimony was given under a misapprehension of the facts. My brother was a witness at the former trial. He and I lived together at Jackass hill in the same neighborhood for many years and mined together for a number of years, and had mined together for a number of years
191 before the suit and before I sold it.

Redirect examination:

Q. In your testimony given at the former trial you said that the vein upon which Rice and Voss worked was the Carrington vein. Will you state whether that was a true statement?

A. It was not. I got mixed up on that. They were working on what is called now the Rice vein. The Carrington vein, I think, is from 60 to 80 feet west of the Rice vein. I never measured it. When I testified at the former trial that the Pine Tree mine sold Stinchfield was a portion of the original Carrington, it was under a misapprehension; it was not a portion of the Carrington. At that time I believed I was testifying to the truth. Since the former trial of this case matters have been called to my attention which leads me to see that I was mistaken in my testimony then, and that I am right now. The testimony which I now give, that the Pine Tree mine and the Carrington mine were two separate and distinct claims and locations, is correct. Before testifying at the former trial of this case I had not talked with any of the locators of the Carrington or of the Pine Tree mine, nor had I spoken to my brother William about the old history of these mines. After the former trial I hunted up the papers in the Page suit. It was a long while
192 after the trial. When I found them, I found, to my surprise, I had gone on the injunction bond as a surety for $1,000. I had forgotten all about that.

The statement made by me at the former trial that I had known the Carrington mine since 1856 was true. It was also true that I had bought the claim from Carrington in 1872. It was also true that Carrington gave me a deed for the entire Carrington claim.

Q. When you stated that you didn't know whether he had made a location by his marks and boundaries of that claim, was that true or not?

A. That's a misapprehension of the facts. I had forgotten it. I had forgotten whether he ever made a location at that time. The statement made by me that I had examined the records and could not find a notice of location of the Carrington is also true.

Q. When you were asked whether, after you deeded a portion of the Carrington claim to the plaintiff in this action, you made a location upon the remaining portion of the Carrington claim, and you answered "I did," was that true?

A. That's true. I did make a location.

Q. I will ask you if it was true you made a location upon the remaining portion.

A. All the remaining portion, besides what I sold, this mine to
Stinchfield? I now state that the Pine Tree was not a por-
193 tion of the Carrington. When I stated I located on the re-
maining portion, signifying I had deeded Stinchfield a portion, that is a misapprehension of fact. When I stated I did not deny the line of the property sold to Stinchfield, that was true.

Q. When you further stated, "We established a line between us. There is a corner post, northeast and southwest, both put up," was that true?

A. Yes; we put up two corners; two corners standing, and we put up two corners. When I stated that I made a location and took my line from the Stinchfield line over to the Santissimo, to the stake, and followed back east to Stinchfield's stake and then in a northwest course back to the place where I started, it was correct. When I stated that there were four posts and monuments, that is correct. When I stated that I posted notices at each end of the claim in the morning before I came over with Stinchfield to make the deed, that is correct. When I stated that I put up two monuments and monuments were already established there, that was correct; it was also correct when I stated that I adopted these monuments. When I stated in my former testimony that "Stinchfield is sandwiched in between me and the Wilson & Means. I sold about 90 feet of the Wilson & Means and about 33 feet of the Carrington," that was not correct. I did not sell him a foot of the Wilson & Means ground.

194 Q. And when you further testified that the Pine Tree vein
itself was a portion of the Carrington claim upon the extreme boundary, was that true?

A. No, sir; it is not true.

Q. And these facts you now testify to which are in conflict with the facts you testified to before——

A. (Interrupting:) They are in conflict. I had forgotten all about it; it has been 35 or 40 years; 35, anyway. I had forgotten about the early location and about the Pine Tree vein being upon the Pine Tree mine, as it was occasionally called. I had forgotten about it; that all went out of my memory. I was engaged in mining on Jackass hill from 1856 to 1858.

Q. I will ask you if the miners had any written rules and regulations at that time—that is, prior to '58—in regard to their locations of claims.

A. No, sir; I never saw any written.

Q. Was there any custom that prevailed among the miners at Jackass hill at that time in reference to what amount of ground that might be held by one locator?

A. Yes; the discoverer could take up 300 feet at that time; two men could locate 450 feet, one 150, and the discoverer 300. The
claim could then be taken up 100 feet in width on each side
195 from the center of the vein.

Mr. Kalloch: In order to make the record clear I will offer the testimony of the witness taken at the former trial and contained in volume 4, August 4, 1890, commencing at page 3, and including the first three lines on page 15 of the same volume, said testimony being as follows:

"I am the owner of the Carrington claim at Jackass hill. I have known that claim since 1856. I bought it from Carrington in 1872, and got a deed for it. I do not know that Carrington ever made a location of the Carrington claim by his marks and boundaries of the claim. I have looked in the mining records of Tuolumne county and never could find any notice of location of the Carrington claim recorded by Carrington. After I deeded a portion of the Carrington claim to the plaintiff in this action, I made a location upon the remaining portion of the Carrington claim, I don't deny the lines Mr. Stinchfield has; I sold him the property and I don't deny that line. We established a line between us there as the corner post. I made a location from his corner line to the line of the Santissimo. I took my line from the Stinchfield line over to the Santissimo and followed down the Santissimo down to their stake and followed back east to Stinchfield stake and then in a northwest course back to the 196 place where I started. I had four monuments, posts and monuments both. I posted notices at either end of the claim the morning I came over with Stinchfield to make the deed. I adopted monuments on the other claims which were already established. I gave him the deed and afterwards located it.

"Cross-examination:

"I posted the notices on the claim the morning I came over to make that deed. I posted them very early in the morning. I saw Stinchfield afterwards. I came over here about two o'clock in the afternoon. I had met him and marked off his boundaries and my boundaries the day before. I posted these notices to comply with the law. As I hadn't found where Mr. Carrington had located it, I thought that Mr. Stinchfield might and I wanted to be on the safe side. I was afraid he might interfere after buying from me. Either him or somebody might do it and there would be a contest on the claim and it would cause trouble, so I located the claim. I relocated the claim, the Carrington claim, being bounded on one side by the ground I had sold to Mr. Stinchfield. I don't know that I was afraid of Mr. Stinchfield particularly. I mean generally, any one might take advantage and locate the mine and give me a contest for it. Of course, I had title to the ground. I owned it. After selling to Stinchfield I also relocated the Wilson & Means claim."

197 Recross-examination:

I was mistaken when I stated in my testimony that the Rice vein was the Carrington. I have known the Rice vein since Rice commenced working on it. It was known as that in the suit, called the Rice vein in the suit. That was the first time it was known as the Rice vein, when this litigation commenced; at the former trial of the case it was called the Rice vein to identify it: before that it had no name.

Q. You say you lost sight of the fact the first time in the last trial that there — two separate and distinct locations over there called the "Carrington" and "Pine Tree"?

A. I didn't lose sight of it; I knew it after I got to thinking.

Q. Who called it to your attention first?

A. Billy Gillis and Mrs. Carrington; I went down to see her; I have been three or four times down to see her.

Q. All the information you got which caused you to change your mind now, change your testimony, is derived from your brother William and Mrs. Carrington?

A. I derived it myself; as soon as I found out about the Page suit, I thought it up.

Q. Did you think about these things before they told you?

198 A. I did; my brother Billy told me and then I thought of Louis Page.

The first information I got as to my testimony being wrong at the former trial of this case was from my brother William, and then it flashed into my mind. All these old reminiscences, when I left Jackass hill, when I came back and boarded with Carrington and the time I used to write his renewal notices on his mine, everything came back. I got to thinking about everything in connection with the case. I did not talk a great — with my attorneys about the case; I don't talk to them now; they blame me enough for it.

Q. When you stated in your testimony at the former trial—when you swore you had a deed for the Carrington claim, to what ground did you refer to as the Carrington claim?

A. The whole of the Carrington claim as I then considered it.

Q. Then you adopted as the corner of your ground and between you and Stinchfield the monument you and he had agreed upon?

A. Yes, I adopted that southwest corner of the Atlas as one, and
accepted the one up; I adopted that as the northeast corner of my
location; I took it as a corner and established my location there
upon one side by the Pine Tree and the other side by the Santissimo. I took the northwest corner of the Pine Tree mine
199 as the northeast corner of my relocation. I think Mr. McTarnahan surveyed from that corner. I had him make a
plat describing my claim as I knew the claim with that as
the northeast corner of it. That plat was made for me before the
last trial of this case and several years after my deed to Stinchfield.

Re-redirect examination:

When I showed Carroll McTarnahan that corner as being the northeast corner of my claim and the northwest corner of the Pine Tree, I thought it was the corner because I thought it was 171 feet.

Q. Was 171 feet?

A. Yes; I know that; I know it.

Q. When you pointed that corner out to Mr. McTarnahan as being the corner of the claim, were you pointing out to him the corner you had measured from or thought you had measured from?

A. Yes; I thought it was the corner because I didn't know any better. I didn't know it was 185 feet. I thought it was 171 feet and I made my location from that. I wrote my location after I put the corner up with Stinchfield.

Q. Did you notice at the time you pointed out to Mr. McTarnahan whether or not that monument which you pointed out 200 to him was in the place where you and Stinchfield had put it?

A. Yes; I noticed that distinctly; it was further down on the gulch and further away; it was a little higher, on higher ground.

Re-recross-examination:

Q. What kind of a monument did you find there when you and Mr. McTarnahan went there to make that survey?

A. I can't remember; I think it was a round stick; I could not say positive; a few rocks; I think it was a round stick; I am not certain; the stick I put there wasn't round; I put a piece of pine board there; I remember it was put up in a few rocks; I don't know what kind of a stick is there today; I never paid much attention to it during the years 1886, 1887, 1888, 1889; I accepted the monument as I told you; I have seen it; I never went with that object, to see if it was there; I had the survey and plat made to locate the line between my ground and Mr. Stinchfield's. Down to the time when I was having this survey made I never thought of questioning that monument; I never had a suspicion; I never accused anybody of taking that ground. We put the stake up together. From the time I sold the Pine Tree mine to Mr. Stinchfield down to the time of the commencement of this action I never had any trouble with Mr. Stinchfield in regard to the boundaries of the Pine Tree mine.

201 WILLIAM SWEARER, called by defendants, testified as follows:

I reside about a mile and a half below Tuttletown.

Q. Are you acquainted with what is known as the Carrington and Pine Tree mine?

A. Well, I know the Pine Tree mine.

Q. Are you also acquainted with what is known as the Carrington mine?

A. Well, the Carrington and Pine Tree mine is the same, is it not?

Q. Well, that is—you know the mines upon Jackass hill, do you?

A. Yes, sir.

I was acquainted with F. B. Rice in his lifetime; I know the defendant, John Voss. I am acquainted with the Rice vein on Jackass hill. I worked there for F. B. Rice. I commenced work there about the middle of April, 1888, and worked there about 14 weeks. I quit and then went back and crushed some rock for him for twelve days. The first work I did for Rice was in an air shaft, then I worked in the incline till we made the connection. The first

work I did was in incline No. 2; Rice and Voss were working southerly in the excavation, and I was working northerly to connect with them. I drifted northerly, wanted to get air.
202 There was some gold taken out in sinking that incline. I don't know how much, as I did not have the handling of the gold. I discovered it and Rice took it out. Incline No. 2 is sunk upon the same vein that incline No. 1 is sunk on. After I made the connection between Rice's and my works, Rice put me to work on the hanging-wall vein; we drifted northerly from Rice incline No. 1. We did our work there on the hanging-wall vein and the center vein. We continued to work there until we made the connection with Stinchfield and the Thompson boys; Rice and Voss had made the excavation to the south of incline No. 1 before I started to work with them drifting north. When I assisted them in running north from Rice incline No. 1 the gold was taken out of the center vein mostly, where the intersection of this crossing cut Rice's vein, right on the hog's-back. Where the veins intersected there was a bunch of quartz, a bulge, a kidney or swell right upon the hog's-back. I did not work down to the foot-wall vein. I worked between the three veins, between the hanging-wall and the foot-wall vein. The distance between the hanging and foot-wall vein—the distance between the hanging and foot-wall veins is 4 or 5 feet. I was present when our works broke through into Stinchfield's works. Fred. Thompson and I were working there when we made the connection and then Warren Stinchfield and
203 Henry and Fred. came in there. They then went to work and measured the ground after dinner. It was measured by Warren Stinchfield, Stinchfield, Henry and Fred. Thompson, Rice. They measured the ground to find out whose ground they were on. I don't know what point they commenced to measure. I can't remember what they said. It was so long ago I can't remember what was said between the parties. They then moved back and put up a bulkhead. The bulkhead was put in the drift between Stinchfield's and Gillis' ground. It was placed 12 feet back in the incline from where we broke through and 4 feet over the line. The bulkhead was erected in Stinchfield's excavations. I don't remember being present when they talked about the bulkhead after it was erected. I don't know what Stinchfield said in reference to it. I saw Mr. Stinchfield drill a hole there at the line where the measurements came. After we broke through into Stinchfield's works I quit work there and went and crushed rock.

Q. Now, state how near to the point where you broke into the works of Stinchfield, how near to that point had you been getting gold along the line of intersection of the middle and west vein?

A. We didn't get any more gold after I made the connection with John Voss in the incline over here in No. 2, after we made the connection here. When we made the connection the ground
204 between the point of connection and Rice's incline No. 1 had all been worked out by Rice and Voss. When I was working with him we got out gold along that portion down there at the

southerly end of the claim. What I crushed up was about $6,600. That's all that was taken out at the southerly end. That would be between Rice incline No. 1 and the point where I broke through into Rice and Voss' works.

Q. Do you know the distance you run on Rice incline No. 2 before you broke through into the excavation made by Rice and Voss?

A. Well, I sunk this shaft from the surface down here till it struck this cross-vein, 15 feet deep, and then drifted, and then made a connection on the intersection of the east and west vein, I think it was 15 feet I drifted northerly, made a connection with Voss.

Q. Then was it within the 16 feet of which you have spoken that the gold was taken out?

A. We had some of it taken out from down here.

Mr. KALLOCH: Northerly?

A. Yes, where John Voss and Rice had taken it out.

Mr. STREET: That was crushed afterwards?

A. That was crushed with some I took out.

205 Cross-examination:

I sunk Rice incline No. 2; I believe it was about 16 feet deep. That is from the surface down to the intersection of the east and west veins. I then drifted north along the line of intersection about 15 feet before I met Rice and Voss. They were working towards me from Rice incline No. 1. All I know about the gold that was taken out there was what I crushed. I don't know how much gold they took out. They made a crushing before; I don't know anything about that. There was some gold taken out between Rice incline No. 2 and the point where I met Rice and Voss, along there in that 16 feet, I don't know how much. I don't know how much Rice and Voss took out north of Rice's incline No. 1. Of the rock I crushed, I got some portion of it before I met Rice and Voss, and some of it was taken by Rice and Voss before I met them. I crushed about $6,600. I don't know what portion of the 6,600 came from the ground I had been working or what portion came from the ground worked by Rice and Voss. I sunk Rice incline No. 2; it had just been started, just showed me where to commence. I worked on the Atlas mine with Rice in the month of May previous to six years and a half ago.

CARROLL MCTARNAHAN, called by defendants, testified as
206 follows:

I have been engaged in surveying for 8 or 10 years. I have been county surveyor of this county for three years. I am also United States deputy mineral surveyor for the State of California. I made the plat shown me of the Pine Tree and Carrington mines. That plat was made from actual survey of the ground therein portrayed. The survey was made in June, 1890. I have on that plat portrayed the general outlines of the Pine Tree and Carrington mines, and a portion of the underground works. The point marked northeast corner of the Pine Tree mine, that's also the southwest corner of the Atlas mine as patented. That is not a moveable corner, because it is a point easy to determine at any time from the field-notes of the survey of the Atlas mine. The line running westerly from that corner to the northwest corner of the Carrington mine is the north boundary line of the Pine Tree and Carrington quartz mines. It is also called the southwest boundary line of the Atlas mine. It is not that line exactly; it does not deviate from it very far.

Q. Mr. McTarnahan, upon that line that you have just testified about, marked the northwest corner of the Pine Tree quartz mine as deeded, what point is that?

A. That is a point that was put on this plat at the end of the 171 feet from the southwest corner of the Atlas mine. There is
207 no point on the ground there; that point was put on there at your direction or somebody else's, I don't know. That point as designated there is very near the southwest line of the Atlas mine. I have placed that point exactly 171 feet from the northeast corner of the Pine Tree mine.

Q. Now about the line running southerly from that point marked northwest corner of Pine Tree quartz mine as deeded, what does that represent?

A. That would represent the westerly boundary line that is drawn to a point 171 feet westerly from the pine tree at the southeast corner of that quartz mine and also designating the same southwest corner of the Pine Tree mine. That line is correctly delineated upon that plat. I have also marked on this plat a point marked northeast corner of Carrington quartz mine and the northwest corner of the Pine Tree mine as located, that is a point where a post and stake is when I went to make the survey as shown me by these parties as being the northwest corner of the Pine Tree and northeast corner of the Carrington. It was a point on the ground, a monument. The distance from the northeast corner of the Pine Tree quartz mine to the point I have marked there as the northwest corner of the Pine Tree mine as located is 185.18 feet; that is a correct measurement. I have also marked on this plat the
208 southwest corner of the Pine Tree mine as located and the southeast corner of the Carrington quartz mine; that is a point at that time occupied by a post in a stone mound there and shown me as being the corner between these pieces of ground. That is the southwest of one and southeast of the other. That point is 219.52 feet distant from the pine tree 20 inches in diameter, being southeast corner of the Pine Tree mine. The distance between the point marked southwest corner of Pine Tree mine as located and the point marked southwest corner of Pine Tree mine as deeded, is 48.52 feet. The distance at the northerly end of the claim, between the point marked northwest corner of the Pine Tree mine as located and the northwest corner of Pine Tree mine as deeded is 14.18 feet. The point on the plat marked "Stinchfield shaft" is to designate a shaft called Stinchfield shaft as located on the Pine Tree mine near Mr. Stinchfield's house. I have also marked "horizontal course of Pine Tree vein," that's the true course of the Pine Tree vein, on the

surface of the Pine Tree quartz mine. On the plat in red I have "horizontal course of the crossing," that's the line of what Mr. Gillis terms the crossing and what Mr. Stinchfield terms his west vein, that's the horizontal course drawn from a point on the croppings to a point on the croppings and to determine its true strike or course.

I have marked Stinchfield's incline and underground works
209 in blue. Upon the Carrington what I have marked in yel-
low "horizontal course of Rice vein" is the true horizontal
course of the vein that cropped in the Rice inclines No. 1 and No. 2. That vein apexes on the Carrington mine. In purple I have marked Rice's inclines and underground works. The yellow line in the purple, representing the excavations made by Rice and Voss, is intended to represent the intersection or junction of the Rice vein, or, in other words, the vein which lies on the foot-wall or Rice's incline, with the west vein or crossing.

The Rice vein dips to the northeast. The crossing or west vein dips to the west, and the yellow line is intended to represent the junction of these two veins. The apex of the backbone in the excavation shows the line of the intersection of these two veins. What I have marked in blue as "horizontal course of the Carrington vein" is the true course of the vein in the Carrington mine, shown me as the Carrington vein. The left-hand portion of the map represents the two mines on a larger scale. That is a scale of 10 feet to an inch.

The distance on the foot of Rice incline No. 1 from the surface to the intersection of the veins is about 18 feet. The distance from
the apex of the Carrington at a point opposite Rice incline No. 1 to
the Rice vein is about 60 feet. The distance from the Car-
210 rington vein at a point opposite Rice incline No. 1 to a point
on the surface just above the intersection of the veins is about
94 feet. The distance from the apex of the Carrington vein to the point marked southwest boundary line of the Pine Tree mine as deeded is about 104 feet—that is, taken at a point about over Rice incline No. 1. The distance from the apex of the Carrington vein to the southwest boundary of the Pine Tree mine as deeded at a point over the lower end of the "Conklin incline" is 112 feet. The distance on the yellow line, being line of intersection of Rice'e vein and the west vein, from the southwest boundary line of the Pine Tree mine as deeded to point of junction of the Rice and Stinchfield works is a little over 7 feet horizontal. The marks in green in Rice's excavation are the veins, what Mr. Rice terms his hanging and foot wall veins. They are little quartz veins above and below what is termed the Rice vein proper. They are placed there from actual measurement. At one point the hanging-wall vein strikes a clay seam. Rice claimed that as his vein up there. This clay seam is marked with a double line. The lower portion of the map represents a transverse section taken of the Rice incline and the vein to show the excavation to the east of this Rice incline No. 1, and then another section showing Stinchfield's north incline and a por-
tion showing the intersection with this vein and the way the
211 veins come down. That marked in purple represents Rice's

incline No. 1, and the line in yellow Rice's vein. The line in green in the Rice incline represents the hanging-wall vein, which originates somewhere between 20 *or* 30 feet below the mouth of the incline. All the workings delineated on this transverse section at the foot of the incline are west of the vertical southwest boundary line of the Pine Tree mine as deeded. The distance between the hanging-wall vein and the middle vein, as shown in the excavation, is a little more than five feet, and the distance between the foot-wall and middle vein is about five feet.

Defendants' map offered and received in evidence and marked Defendants' Exhibit 2.

(Here insert map.)

Cross-examination:

I made this plat for defendants in June, 1890, at about the same time I made the survey for plaintiff. I made defendants' plat at Mr. Gillis' request. The red line which is marked Stinchfield's west vein on the plaintiff's map represents the same as the red line marked horizontal course of crossing on defendants' map. When I made the survey for this plat Stinchfield and Gillis showed me
the corner representing the northwest corner of the Pine
212 Tree mine, as located. They both acquiesced in it. It was
a post in stone mound, monument of stone. I also found a
similar monument at the southwest corner of the Pine Tree mine. I then run the line between those two points.

Q. In the course of that line and in the neighborhood of what is shown on this plat as Rice incline No. 1, did you make any marks as indicating the place where that line passed on that survey?

A. Yes, sir, on the butt of a live-oak tree, on a white-oak tree northwesterly of that point, and on a stump southeasterly of that point. Those two oak trees are delineated upon plaintiff's map truly as to location as compared with other marks and monuments.

Q. What kind of marks did you put in these trees and stump?

A. I believe I drove a nail in at the point where the line cut. These oak trees and this stump are in a direct line running from the southeast to the northeast corner. The live-oak tree is within 30 feet from the Rice incline No. 1. It is 27 feet, at right angles, from the mouth of Rice incline No. 1 to the boundary line between the Pine Tree and the Carrington claims. If that tree had been directly opposite the mouth of Rice incline No. 1 it would be 27
feet to that tree. Mr. Gillis and Mr. Stinchfield showed me
213 the monument at the southwest corner of the Pine Tree
mine. Mr. Stinchfield was along and didn't seem to say
much of anything; Mr. Gillis, if I remember right, was doing the talking, and Mr. Stinchfield didn't interpose any objections to it, seemed to be satisfied, and I went on. Mr. Gillis did the talking and showing of these points. When I drove the nails into the oak trees and the stump I think Mr. Rice was along. I don't know whether Gillis or Stinchfield was present or not. I found the monuments on the ground at the points marked on the plat northwest

and southwest corners of the Pine Tree mine "as located." There were no monuments on the ground at the points I have marked on the map as northwest and southwest corners of Pine Tree mine "as deeded." I did find those monuments at the northwest corner and the southwest corner of the Pine Tree mine as shown me by Mr. Gillis as marked located upon the plat. I didn't examine to see anything about them. There was no question about them. The Carrington mine as *a* delineated on this plat would not be immediately adjoining the Atlas mine; there is an angle running in between the Carrington and Atlas. From a point where the Rice incline No. 2 would meet the intersection of the *the* Rice and west veins to a point where the intersection of the veins would cross the line indicated on this plat as the southwest boundary of the 214 Pine Tree mine as located is between 12 and 13 feet horizontally. It would be more on the angle, but less than 16 feet.

The plats of plaintiff and defendants which have been introduced here in evidence are the same plats concerning which I testified at the former trial.

Q. Will you indicate upon defendants' map a point upon the line marked southwest boundary of the Pine Tree quartz mine where the oak tree you have testified to as being near the Munn incline would be located?

A. There, just above the letter "n" in the word "pine," close to the letter "e." That point is near the white-oak tree indicated upon this plat. It is 99 feet and two or three inches from the northwest corner of the Pine Tree mine as located. If the point marked northwest corner of the Pine Tree mine as deeded were the true corner of the claim, and this live-oak tree were the true mark of the boundary, there would be quite an angle in the boundary line. Instead of being a straight line running between the two corners as I run the line, it would deflect to the north considerable.

Redirect examination:

When Gillis was showing me the boundaries at the time I 215 made the survey, he would come to me and show*ed* me a monument and it looked to me as if he did not care much about it; he would show me a point and would say, I guess that's the monument, and walk off afterwards and not say this is the monument itself. Stinchfield was not with me, I am pretty certain, at the northwesterly and southwesterly corners of the Carrington. He was along when the monuments of the Pine Tree were pointed out. He didn't say anything about them; I don't believe he said a word. He just went along and saw what Gillis pointed out to me. I believe I was five or six or seven or eight days in making the survey there.

Recross-examination:

Mr. Rice was always around when I was surveying the underground works; at least he was there to determine every point—that is, to direct about the points, questions I might ask him. The distance from the northwest corner of the Pine Tree mine as located, as shown on the plat, to the northwest corner of the Carrington quartz mine is 323.75 —. The line marked on the plat as the north boundary line of the Carrington mine is 61.75 feet longer than the line described in Gillis' notice of location of the Carrington. In the notice of location it is 262 feet and the distance on the ground as measured by me is 323.75 feet.

216 Mr. STREET: Mr. McTarnahan, I will show you the notice of location of A. W. Stinchfield of the Pine Tree mine, made January 20th, 1886, and which has been read in evidence; I will ask you to read that notice and state if that ground as located conforms to the ground which you have marked upon this plat as the Pine Tree mine as located.

A. No, sir, the notice does not describe the ground, that is, as it is delineated upon this plat; that is, it does not describe it the same. The claim as located at the northerly end, the length of that line would be 182 feet. The claim I surveyed as being the location of the Pine Tree mine I have the northerly end line 3 feet and 18 in. longer than the line described in the notice of location. At the southerly end of the claim the southerly boundary line of the Pine Tree mine as surveyed and platted by me is 23.52 feet longer than the same line contained in the notice of location.

Mr. OTIS: Does that notice of location counsel has shown you describe the land in this map marked and designated by you there as the land located or the land deeded?

A. It does practically do that thing. Of course, there is no reference in this notice that I saw to the Atlas mine or to anything of that kind, but just take and place it, it practically does, but it does not specify where.

217 JOHN VOSS, called in his own behalf, testified as follows:

I am one of the defendants in this suit. I know the Carrington and the Pine Tree mines. I commenced to work on the Rice vein on the Carrington mine in December, 1887. Rice and I leased it of Jim Gillis; we were to give Jim Gillis a quarter of the gold taken out, and the balance was to be divided between Rice and I. When I went to work there the Rice incline No. 1 was down about 25 or 30 feet. I worked there from December, 1887, till July, 1888. We first worked in Rice incline No. 1, and we drifted till about June, and then we went to work on the Rice incline No. 2; this incline is on the Carrington claim. We sunk that incline to a depth of about 20 feet. We had one vein when we started in on the top and down below it split out. We found gold in Rice incline No. 2 on the crossing. I do not know what is called the west vein; I know what is called the crossing. That crossing came in on our vein and at the place of intersection we got gold. In shaft No. 2 we got 6 or $7,000. From the foot of that incline we worked down connecting with shaft No. 1. We worked toward shaft No. 1, some 15 or 20 feet. In working towards shaft No. 1 we followed the intersection of the

crossing with our middle vein. Going north from incline
218 No. 2 to incline No. 1 we took out gold; that's where we had
it. When we took out the gold we did no further work between shaft No. 1 and shaft No. 2. We then went to work northerly below incline No. 1; we looked for gold there but didn't find any, and then we quit. In our works there we came in contact with Stinchfield's works. That was about 10 feet below shaft No. 1, where we broke into Stinchfield's works. (Map shown witness.) We sunk incline No. 1 down till we came to this crossing; we then worked it up southeast, something like 20 or 25 feet, taking out what we could dig out here, you know, and then we got foul air, and had then to run shaft No 2. We then sunk shaft No. 2 down about 20 feet, when we struck into the intersection where we took out gold. We then worked from the excavation from Rice incline No. 1 south and from shaft No. 2 north along the intersection till our works met, until we worked out the intersection from shaft No. 1 to shaft No. 2. We did not get much gold following the intersection north from Rice incline No. 1 to Stinchfield's works. Rice and William Swearer was working with me when we broke into Stinchfield's works. Fred. Thompson was the person I saw in the hole first. He went out and Stinchfield came in there. Rice sent Billy Swearer after
Jim Gillis, and then Jim came down and he said that Stinch-
219 field had come on our ground. Stinchfield wouldn't believe
it, and Rice and Gillis told him they wanted to measure it, and they then all went outside and measured it, and they came down again and they put up some timbers and told Stinchfield he was 12 feet on our ground. Stinchfield and the Thompson boys put up the timbers, and I filled in the hole afterwards. I worked a week or two after that, then I quit. The gold we took out some of it was pure and some of it was in the rock. The gold that was in the rock we pounded it out in a mortar at Rice's house. We first discovered gold there in January, '88, in Rice incline No. 1. The first gold we got was about $300; that was the first evening when we struck the crossing. We then followed it up southerly along the line of the intersection, and had gold more or less every day. The gold that was not in the rock we panned it out on the ground.

Q. Was Stinchfield there?

A. Yes, sir.

Q. During the time that you were working on that mine, these inclines, did Stinchfield make any objections to your working there?

A. No, sir; he came around sometimes and asked how it prospected. I told him that it was pretty good. He never made any
demand for any of the gold from me. Before I went to work
220 there the Rice incline No. 1 was down about 25 or 30 feet.
The value of the work and labor we performed there was worth over $1,000. Rice did the business in regard to the gold. He took out the dividend and brought it to me and took Jim Gillis his portion. The bulkhead was put in the works to indicate our line on the claim, to indicate the line between us and Stinchfield.

Cross-examination:

The first time I went down to Jackass hill was in December, 1887. At the time I went there I knew Rice and the Pine Tree and the Carrington mines. I first went to work with Rice on his own ground right back of the Atlas. I guess that was about October. I worked there off and on till December. Then Jim went down below and Rice told me about this shaft he had there and about the prospect he had in it; Jim was in San Francisco. When I quit working on the other side of the Atlas I went up to Mountain Brow and stayed a few days and then went back to Jackass hill.

Q. What did you do when you went back there?

A. Jim had come back from San Francisco and I went to Jim and asked about this ground. Rice and I went to work there. Gillis told us we could work there and give him a quarter for working.

221 Q. Do you know how long it was after you struck the gold, the first time you had $2,000 or $3,000 to pound up in a mortar?

A. Two or three weeks.

Q. How long after the first $2,000 or $3,000 you pounded up did you have the next?

A. Maybe a week or so afterwards; we got it right along.

When we went to work the Rice incline was down about 25 or 30 feet. There was a track in the incline when I went to work there, pick and shovel, and there was some powder there, inside the incline. There was a platform at the top of the incline. The windlass was not there. We must have worked down about 50 feet from the surface when we struck the crossing. We then drifted southeast. Altogether we drifted southeast 35 or 40 feet. We drifted 20 or twenty-five feet before we made a connection with the drift run from shaft No. 2. We made that connection somewhere the latter part of May, 1888. Billy Swearer and I sunk incline No. 2. Rice and I paid Billy Swearer for his work. I think he worked for us about six weeks. He worked a week or two after we met Stinchfield in the works. In the Rice incline No. 2 at the top we had one vein; it split into three veins as we went down. In the works, from incline No. 1 to incline No. 2 I should say was about 40 feet.

222 We met Stinchfield in his works in June, 1888. When we met, Fred. Thompson was working in Stinchfield's works. I did not see anybody else working in there. Rice, Stinchfield, Gillis and the Thompson boys did the measuring. I was in the mine at the time. I did not see them measure on the outside. I know Stinchfield put up a bulkhead and went back 12 feet off our ground. I saw that. I don't know anything about what they measured. We first found gold in the bottom of Rice incline No. 1 in January, 1888. That was where we struck the crossing. Rice was with me when we struck the crossing. After that we worked south, some days we had $50 and some days $1,000. We took it out and when we had 2 or $3,000 we pounded it up in a mortar. Stinchfield lived in a cabin right by us, was around every day, used to see us

panning out right upon the mine. We panned out some 15 or 20 feet south of Rice incline No. 1. I saw Stinchfield most every day. He came over and saw what we were doing; he and Rice were good friends. When Rice was panning out he came over and talked to Rice in a friendly way. I don't remember the exact dates when Stinchfield was there in March, April, May and June; every month when we were working there he was working close by there. I never saw Stinchfield down in our works before we broke through into his works. I never heard any conversation between Rice and
Stinchfield about Stinchfield's going down into the claim. I
223 never heard Rice invite Stinchfield down or refuse to let him
go down into our works. At the bottom of Rice incline No. 1 we had three veins—foot-wall, middle and hanging-wall veins. We had the gold between the foot-wall and middle vein, where the crossing was. The crossing pitches west. Our veins pitch east.

Defendants rest.

A. W. Stinchfield, recalled in his own behalf, testified as follows:

I remember that it was in the month of July, 1888, when we met Rice and Voss in our works. I did not make any agreement at that time with Gillis, Rice or Voss to move or change lines of my claim. I heard the testimony of Voss a few moments ago. I saw Rice and Voss first at work there in January, 1888. They had neither of them done any work on the Rice vein previous to that time, after I got my deed. I never saw Rice or Gillis or Voss take out any gold from their works there. I have seen them panning on the dump. I have seen them packing rock away, packing out rock with gold in it, throwing it out in a bucket or something. I had heard they were taking out gold: they never told me. I believe
I asked Voss one time something about the prospect and he
224 said, I have got a little fine gold; didn't say how much. I
never asked either Rice or Gillis as to whether they had taken out any gold from my ground. When we broke through I asked Rice if he knew he was working on my vein; he said, No. I said, I know you are working on my vein. I only sued for $10,000 because I did not know the amount of gold they had taken out. They never told me; they appeared to want to keep it dark from me when they were getting gold, and how much they had taken out. I didn't know when they cleaned up. When our works met, they had taken out everything in their works. I could not see anything to work there for. I never had any knowledge of the relations claimed to have existed between Rice, Gillis and Voss in the working of the Carrington mine. I have been a miner since 1875. I am familiar with pocket mining and the expenses ordinarily incurred in such mining. At the time I purchased there was no windlass at the Rice incline; the platform and uprights were there. They were taken away in the summer of 1886, after I purchased. The ground at Jackass Hill, some of it is hard, softer near the surface.

Q. Assuming that the Rice incline No. 1 was 30 feet deep at the time you made your purchase from Gillis, can you state about how much the cost of sinking that shaft 30 feet at that time would have been?

225 A. I should think $200. There was no work done in that incline from the time I purchased till Rice and Voss went to work there in December, 1887. In my notice of location I described the ground I had bought from Gillis as the Pine Tree mine to designate it from the other claims adjoining. It had never been known as the Pine Tree mine till Gillis and I gave it that name in the deed. The Pine Tree mine at that time was reputed to be on the Carrington.

Q. Prior to the time these defendants broke through into your works, did you ever know of Rice, Gillis and Voss or either of them taking any gold out of your claim?

A. No, I didn't know where they were working; they wouldn't allow me down in the diggings; that's the first time I had been through there, when we broke through; I didn't know when they passed the line, the surface line.

Cross-examination:

I think it was about the middle of July when we broke through into the works excavated by Rice. I was working there that day. Henry Thompson and I were on the surface at that time. Fred. Thompson was working there just at the time they broke through. I then went down into the diggings. I saw the Thompson
226 boys there, Rice, Voss and William Swearer. I asked Rice if he knew if he was working on my vein. He said, No, if this is your vein I don't want it. I said, Well I know you are working on it. Then Gillis came down there. He said, You are working on my ground, working on my vein. I says, We hav'n't got your vein; I am working on my own vein. That was about all that was said by me to Gillis or that Gillis said to me. We stopped only a short time, then each one went up. We looked through Rice's excavations, then went out of the diggings on the surface. That's about all we did that day. We were about there that afternoon. There was some measurements made the next day. The Thompson boys told me that Rice had told them that he wanted to measure the ground. He contended that the side line of the Pine Tree mine dipped at the same angle as the Pine Tree vein; that he had started 26 feet from the line and that he had that distance above his vein on the slant down under my claims, and that's what the Thompson boys told me Rice wanted to measure. I told him I didn't think it amounted to anything and I didn't know as I had any objections, the gold was already taken out. There was some measurements made by Rice and the Thompson boys. They measured on the surface from the side line running between the Pine Tree and Carrington claims, measured from this side line to the top of the
227 Pine Tree incline, then they measured down the incline to the foot of the incline, then measured in the drift southwesterly as far as the Thompson boys and I had worked and then measured southeasterly about to where the works met.

Q. Now, who computed the distances and measurements?

A. I didn't have anything to do about it; I believe Rice and Henry Thompson computed the distances and measurements. I was with them a part of the time when the measurements were made. Rice and the Thompson boys established the bulkhead, put a line across the drift where the Thompson boys and I worked.

Q. Didn't you assist in marking that line?

A. I told them I didn't have anything to do with it; I had no objection to their measuring there after the gold was all out. I might have made some marks there; not to establish any boundary line between. I don't know what it was, whether it was a drill or pick. I did not make more than one. That was a little north of where the bulkhead was erected, some two or three feet. That was where Rice claimed that this side line would strike under my surface. After these marks were made there was some timbers put up. The Thompson boys put the timbers; Rice, I believe, put up one
post. I assisted in putting on some plank. I thought it
228 would answer in place of a gate there, and it would keep the
blasts from hitting each other and keep people from running
through; that's the most I wanted it for. The Thompson boys were there with me on shares. The bulkhead was put there as the dividing line between the works. I never agreed to that being the line with anybody.

From January to July, 1888, I frequently saw Rice and Voss at work on the surface and going to and from the place where they lived to their incline. I have seen them carrying a bucket to their cabin. I had been told that Rice and Voss were getting out gold. I did't know where they were working and did not know when they passed the line.

Mr. Street: While down in the works with Mr. Rice and looking over his excavation, did you make any demand on him at that time for any moneys which he might have taken out or you thought he might have taken out of this excavation?

A. No, I told him that I didn't think he had any right to take my vein out; I claimed my west vein, always did. I contended he had no right to take it out. I had bought the ground from Mr. Gillis and he had no right to take out my vein under my surface. I did not know what they had taken out at that time.

229 Redirect examination:

Mr. Kalloch: Mr. Stinchfield, did you take any steps towards stopping these parties from working on that ground when you first were informed they might be on your ground or taking your money?

A. I came to see you about it.

Q. Do you remember how many times you came to consult me about that?

Mr. Street: I object to that — immaterial, irrelevant and incompetent for any purpose in this case; the fact that this witness may have called upon an attorney and never informed or said anything to the defendants about this matter, or never told them of the advice he got would not be relevant testimony.

Objection overruled.

Exception noted. Exception No. 17.

A. Quite a number of times; I don't remember how many; several times.

HENRY A. THOMPSON, called by plaintiff, testified as follows:

I am acquainted with A. W. Stinchfield and was acquainted with F. B. Rice in his lifetime. I also know J. N. Gillis and John Voss. I know the Pine Tree mine and the west vein situate thereon. 230 I worked on the Pine Tree mine first in the winter of 1886, and then in '87 and after some interval I worked there in '88. I worked sometimes alone and sometimes with Stinchfield. I worked on the west vein. I was at work on the west vein in July, 1888, when the works of Stinchfield and the defendants met. Stinchfield and my brother Fred. was working with me at the time. We were following the west vein in the drift. I was there during the proceedings regarding the erection of the bulkhead. Stinchfield did not authorize or agree during those proceedings to any change or modification of the lines of his claim. I know where the northwest corner of the Pine Tree mine is as marked by a stake in stone mound. I have known that corner since some time in the early part of 1886. I think it was in the month of February or March, 1886, that I first saw that corner. It remains in the same place now that it was in when I first saw it.

Cross-examination:

I was working in the excavation at the time we broke through into Rice's works, after which we made certain measurements. We measured from the line between the Pine Tree mine and the Carrington mine to the apex of the Pine Tree vein, and then we measured the drift underground. Mr. Rice claimed we were 231 working on Gillis' ground and we measured to find out whether we were or not. After we made these measurements we put up this bulkhead. We didn't establish any line there nor mark any line there to my knowledge. The bulkhead was put up within two or three feet of the point to which we measured. We had measured to a point which would represent where the side line would come down and intersect the works. Mr. Stinchfield was on the ground at the time these measurements were made. When we erected the barrier he was still with us. I was working there with him on shares.

Q. When you put up that barrier you put it there, didn't you, as the agreed boundary line between your claims?

A. Well, I believe we did, as far as I was concerned, agree that I should not work on the other side of that barrier.

Q. Now, was it not put there as the agreed boundary line between the claims?

A. As far as I was concerned, yes. Stinchfield was present during all the time that the measurements were made, and was present at the time the barrier was erected. He did not tell us not to erect the barrier, nor did he tell us not to make those measurements.

Frank Washburn, called by the plaintiff, testified as follows:

232 I am 34 years of age. I am acquainted with the plaintiff, I am his cousin. I know the parties to this action and the mine in controversy. I was present when the survey was made by McTarnahan, shortly before the last trial of this case. I was present part of the time when that surveyor ran the dividing line between the Pine Tree and Carrington mines. I saw the surveyor drive a nail in a tree on the dividing line between the Pine Tree and the Carrington mines. Mr. Gillis and Mr. Rice were present at the time. They made no objection to the surveyor fixing that line at that point at the time. I never heard any objections. I was at Jackass hill in 1877. At that time I knew the ground that the plaintiff owns there now as the Carrington claim. In 1877 there was no such claim known there as the Pine Tree mine. The mine which the plaintiff owns there was then known as a part of the Carrington mine to my knowledge.

Cross-examination:

In 1877 I was 17 years old. I was in this county in that year from July to November. I had never been — the county before. I was here then some three or four months. During that time I was at Jackass hill off and on all the time. Mr. Stinchfield and his father were working at the hill at that time. I don't remember any one else that was working there then. I met Mr. Gillis
233 at that time. Mr. Stoker was working there somewhere, I
don't know where. I worked upon the claim that Stinchfield now owns. At that time I knew the Wilson & Means mine and the Atlas mine. I don't know that there was any one working on the Atlas mine while I was there in 1877. Mr. Stinchfield told me it was the Atlas mine. All the information I got about the mines on Jackass hill was from what Mr Stinchfield and Mr. Gillis told me. I heard the Wilson & Means mine spoken of by Mr. Stinchfield. I never heard any claim over there called the Pine Tree claim at that time. I heard of the Pine Tree vein.

Mr. Kalloch: That's our case.

The Court: In the above-entitled action, that portion of the evidence of A. W. Stinchfield, which was objected to under sub. 3 of section 1880 of C. C. P. and which evidence was admitted subject*ed* to be stricken out as to all the defendants or either of them should the court be so advised, the court having duly considered the same, now orders that the said evidence be stricken out only as to the defendant, J. F. Faxon, administrator of the estate of F. B. Rice, deceased, and that it stand as to the defendants J. N. Gillis and J. N. Voss.

Excepted to on the part of defendants Gillis and Voss.

234 That the court thereafter, to wit, on the 21st day of June, 1893, rendered its decision in said action in favor of plaintiff for the sum of $10,000 damages and costs of suit.

Thereafter, and within the time prescribed by law, the defendants duly filed with the clerk of said court and served upon the counsel for plaintiff a notice of intention to move for a new trial in said action, of which said notice the following is a copy, to wit:

In the Superior Court of the County of Tuolumne, State of California.

A. W. STINCHFIELD, Plaintiff,
*vs.*
JAMES N. GILLIS *et al.*, Defendants.

To the plaintiff above named and to I. M. Kalloch and F. P. Otis, Esqrs., attorneys for said plaintiff:

You will please take notice that the defendants in the above-entitled action intend to move the said court for a new trial in this case upon the following grounds:

1st. Insufficiency of the evidence to justify the decision in said case.

2nd. That said decision is against law.

3rd. Errors *at* law occurring at the trial of said action and excepted to by the defendants.

235 The said motion will be made upon a statement of the case hereafter to be prepared and served upon you.

F. W. STREET AND J. F. ROONEY,
*Attorneys for Defendants.*

July 3rd, 1893.

Service of the within notice and a receipt of a copy thereof is hereby admitted this 3rd day of July, 1893.

I. M. KALLOCH AND F. P. OTIS,
*Attorneys for Plaintiff.*

Endorsed: Filed July 3, 1893. D. M. Ortega, clerk.

And the defendants now set forth the following as the specification of errors:

*Errors in Law.*

Defendants specify the following errors in law occurring at the trial and excepted to by the defendants as particular errors upon which they will rely upon motion for new trial:

1. The court erred in overruling the objection of defendants' counsel to the following question, which appears in this statement at page 41:

Q. Were or were not those corners as so marked agreed upon by you as the corners of the ground conveyed to you by Mr. Gillis at that time?

236 Defendants' exception to such ruling being noted as defendants' exception No. 1.

2. The court erred in overruling the objection of defendants' counsel to the following question, which appears on page 41 of this statement:

Q. Did you get any gold from that vein while you were working upon it?

Defendants' exception to such ruling being noted as defendants' exception No. 2.

3. The court erred in overruling the objection of defendants' counsel to the following question, which appears in this statement at page 50:

Q. Where were they working at the time you made this purchase?

Defendants' exception to such ruling being noted as defendants' exception No. 4.

4. The court erred in overruling the objection of defendants' counsel to the introduction of plaintiff's map in evidence, "Plaintiff's Exhibit B."

Defendants' objection to such ruling being on page 61 of this statement, noted as defendants' exception No. 5.

5. The court erred in overruling defendants' objections to plaintiff's counsel introducing in evidence the official transcript of the testimony of F. B. Rice, deceased, taken at the former trial of the case.

237 Defendants' objection to such ruling being on page 82 of this statement, noted as defendants' exception No. 6.

6. The court erred in overruling the objection of defendants' counsel to the following question which appears in this statement on pages 95 and 96.

Q. Mr. Stinchfield, in your examination-in-chief, when upon the stand you testified you never heard the Pine Tree mine called such prior to the time of your getting the deed from Mr. Gillis of the ground; I will now ask you if in the spring of 1884, at the Buckeye tunnel on Table mountain, in a conversation with Mr. Voss, in which Mr. Voss asked you where you were working, you didn't state to him you were working upon the Pine Tree mine?

Defendants' exception to such ruling being noted as defendants' exception No. 7.

7. The court erred in denying defendants' motion for a nonsuit.

Defendants' objection to such ruling being on page 96 of this statement, noted as defendants' exception No. 8.

8. The court erred in sustaining the objection of plaintiff's counsel to the following question asked by defendants' counsel, which appears in this statement at page 139.

238 Q. Mr. Page you became satisfied afterwards that Mr. Carrington had a right to the claim when you were informed so, did you not?

Defendants' exception to such ruling being noted as defendants' exception No. 9.

9. The court erred in sustaining the objection made by plaintiff's counsel to the following question asked by the defendants' counsel, which appears in this statement on page 143 and 144.

Defendants' objection to such ruling being noted as defendants' exception No. 10.

10. The court erred in overruling the objection of defendants' counsel to the following question as appears in this statement on page 151.

Defendants' exception to such ruling being noted as defendants' exception No. 11.

11. The court erred in sustaining the objection made by plaintiff's counsel to the following question which appears in this statement at pages 159 and 160.

Q. By that deed which you got from Carrington, I will ask you if it was your intention to purchase all the property he had on Jackass hill?

Defendants' exception to such ruling being noted as defendants' exception No. 12.

12. The court erred in sustaining the objection of plaintiff's counsel to the following question which appears in this statement at page 160.

239 Q. Mr. Gillis, in 1872 did you make any agreement with Carrington in reference to the Pine Tree mine?

Defendants' exception to such ruling being noted as defendants' exception No. 13.

13. The court erred in granting the motion of plaintiff's counsel to strike out the words, "as I had derived title from him," as appears on page 161 of this statement.

Defendants' exception to such ruling being noted as defendants' exception No. 14.

14. The court erred in sustaining the objection of plaintiff's counsel to the offer made by defendants' counsel to prove certain facts by the witness J. N. Gillis, as appears in this statement at pages 161, 162 and 163.

Defendants' exception to such ruling being noted as defendants' exception No. 15.

15. The court erred in sustaining the objection of plaintiff's counsel to the following question asked by the defendants, which appears in this statement at page 173.

Defendants' exception to such ruling being noted as defendants' exception No. 16.

16. The court erred in overruling the objection made by defendants' counsel to the following question, which appears in this statement at page 229.

Defendants' exception to such ruling being noted as defendants' exception No. 17.

240

## II.

### *Insufficiency of the Evidence to Justify the Decision in said Action.*

The evidence is insufficient to justify the finding that, "For about fourteen years immediately prior to the 17th day of January, 1886, the mining claim described in the complaint as the 'Pine Tree' and the mining claim now known as the 'Carrington,' which lie side by side, were held and claimed by the defendant Gillis as a single mining claim, and known and designated as the 'Carrington' or 'Old Carrington' claim."

On the contrary it appears from the evidence that the ground in the complaint described, and what is known as the "Carrington" mine, were during all the time in said finding mentioned, held and claimed by the defendant Gillis as two separate and distinct claims; that said claims, the "Carrington" and the "Pine Tree" were two separate and distinct locations, the former located in 1854 and the latter in 1859 or 1860, and that ever since the said locations the said mines have been held and claimed by the defendant Gillis and his grantors as two separate and distinct mines.

The evidence is insufficient to justify the finding that "The said 'Carrington' or 'Old Carrington' claim, as it was held and claimed by Gillis prior to said 17th day of January, 1886, consisted 241 of a piece of ground about 750 feet in length by about 450 feet in width, and included within its exterior boundaries various quartz veins now known as the 'Carrington,' 'Criss,' 'Rice,' 'Ray,' 'Pine Tree,' 'Stoker' and 'West.' During all the time said piece of ground was in the possession of the defendant Gillis, it was held by him as one mining claim and was known and described by him and by everybody who had anything to do with or concerning it as the 'Carrington' claim, or 'Old Carrington' claim, and not otherwise."

On the contrary it appears from the evidence, and uncontradicted, that the "Carrington" or "Old Carrington" claim, as held and claimed by Gillis from the time of its purchase by him in 1872 to the 17th day of January, 1886, consisted of a piece of mining ground 1,000 feet in length on and along the "Carrington" vein by 100 feet in width on each side from the center thereof; and that the only veins situated within the exterior limits of its exterior boundaries were and are now known as the "Carrington," "Criss" and "Rice;" that the veins known as the "Ray," "Pine Tree," "Stoker," and "West" are situate within the exterior boundaries of that certain mining claim known and claimed by the defendant Gillis and his grantor since 1860 until the 17th day of January, 1886, as the Pine Tree mine; and that the defendant Gillis during the time mentioned in the finding, was in the possession of 242 the mining ground described in the finding, and the same was held by him as two separate and distinct mining claims, and it was known by him and everybody that had anything to do with the ground as the Carrington and the Pine Tree mine.

The evidence is insufficient to justify the finding that "Stoker took possession of the ground in which the Carrington and the Pine Tree veins lay, and held it as one claim until January, 1872. During that time—from July, 1870, to June, 1872—there was no claim nor any location known as the "Pine Tree." * * * All the ground now known as the "Carrington" and "Pine Tree" mines was then held and known as the "Carrington claim," and such assessment-work as was done was done upon said ground as and for the Carrington claim."

On the contrary, it appears from the evidence that Stoker took possession of the "Carrington" and "Pine Tree" mines as located in 1854 and in 1860; that at the time he took possession of these mining grounds there was comprised within the tract two separate and distinct claims. (By no act of his were they united, nor by the lack of information on his part could they be consolidated.) It appears from Stoker's evidence that he worked the ground for what he could find, and it does not appear in the evidence in this case that
the work he did upon the ground was done "as and for the
243 Carrington claim."

The evidence is insufficient to justify the finding that, "from 1870 until the sale by Gillis to plaintiff in 1886, all the ground comprising the present Carrington and Pine Tree mines was known as the Carrington claim, and was held by Gillis as the Carrington claim, and no Pine Tree mine or claim existed. In 1876 the defendant Gillis showed plaintiff the boundaries of the Carrington claim, as purchased by Gillis from Carrington, and the ground afterwards sold to plaintiff was included within those boundaries as shown to plaintiff in 1876. At the time of the sale to plaintiff in 1886 the defendant Gillis told plaintiff and the plaintiff believed that the ground conveyed to him was a part of the Carrington claim. Gillis represented to plaintiff that the ground which he, Gillis, conveyed to plaintiff (which is the same ground described in the complaint) was a part of the Carrington claim which he, Gillis, had bought from Carrington in 1872."

On the contrary it appears from the evidence, that from 1870 until the sale by Gillis to plaintiff in 1886 all the ground comprising the present Carrington and Pine Tree mines was not known as the Carrington claim, and was not held by Gillis as the Carrington claim, but was known and held by Gillis as the Carrington and
Pine Tree mines, and the Pine Tree mine was during said
244 time an existing mine and claim; that the ground sold by
Gillis was not included within the boundaries of the Carrington claim as such boundaries were shown by Gillis to plaintiff. It further appears from the evidence that Gillis did not tell plaintiff that the ground conveyed to him was a part of the Carrington claim. That it appears from the deed in evidence that the ground conveyed by Gillis to plaintiff is not the same ground described in the complaint, nor did Gillis represent to plaintiff that the ground which he conveyed to plaintiff was any part of the Carrington claim, which he had bought from Carrington in 1872.

The evidence is insufficient to justify the findings wherein it is found, that the plaintiff Stinchfield upon permission obtained from

Gillis, worked especially on the "West" and Pine Tree veins as a part of the Carrington claim from the year 1876 until January, 1886; on the contrary, the evidence shows that the veins mentioned were upon what was known and what was the Pine Tree mine during the time mentioned.

The evidence is insufficient to justify the finding that, "In January, 1886, * * * defendant Gillis sold to plaintiff a portion of the said ground held by him as the Carrington mining claim, said portion being the northeasterly side, and extending the entire
245 length of the claim, and being in area about one-third of the whole claim."

On the contrary, it appears from the evidence that Gillis sold no portion whatever of the Carrington claim to plaintiff.

The evidence is insufficient to support or justify the finding wherein it is found that in the deed from Gillis to plaintiff the ground conveyed to plaintiff was "in said deed designated and described as the Pine Tree mine for the purpose of distinguishing it from the remaining part of the old Carrington claim retained by Gillis."

On the contrary, it appears from the evidence that the ground conveyed by Gillis to the plaintiff was designated and described in the deed as the "Pine Tree mine" because it had been known as such mine ever since its location in 1860, and not for the purpose of distinguishing it from the portion of the old Carrington claim retained by Gillis, because it appears from the evidence in this case that no portion of the Carrington mine was conveyed by Gillis to plaintiff, but that the conveyance to plaintiff was of the "Pine Tree mine."

The evidence is insufficient to justify the finding that "the apex of the west vein was and is within the portion of the old Carrington claim sold to plaintiff."

246 On the contrary, it appears from the evidence that no portion of the old Carrington claim was ever sold by Gillis to plaintiff, and that the apex of the west vein on any ground sold by Gillis to plaintiff was and is upon what has been known as the Pine Tree mine ever since its location in 1860.

The evidence is insufficient to justify the finding that "the portion of the old Carrington claim marked off and sold to and conveyed to plaintiff by Gillis was and is the same ground described in the complaint and now known as the Pine Tree mine."

On the contrary, it appears from the evidence that no portion whatever of the old Carrington claim was either marked off, or sold, or conveyed to plaintiff by Gillis. It further appears from the evidence that the ground described in the complaint is no part or portion of the old Carrington claim; that the ground conveyed by Gillis to plaintiff was at the time of the conveyance, and ever since 1860 has been known as the Pine Tree mine.

The evidence is insufficient to justify the finding that "the monuments and lines established and agreed upon by defendant Gillis and plaintiff have remained undisturbed to the present time."

By the deed from Gillis to plaintiff and from the complaint it ap-

pears that the monuments and lines established by Gillis and
247 plaintiff embraced a piece of mining ground which was 171
feet in width at each end, and from the evidence of the surveyor, who made a survey of the Pine Tree mine for the plaintiff, it appears that the lines at the time of such survey had been extended so that the width of the ground at the northerly end was 185.19 feet, and at the southerly end was 219.52 feet.

The evidence is insufficient to justify the finding that, "no gold excepting a prospect was found during this work and the said Rice had quit work in said incline or shaft, and had removed therefrom the said uprights and windlass some time prior to January 17th, 1886."

On the contrary it appears from the evidence that prior to the 17th day of January, 1886, Rice had not quit work in said incline or shaft, that the platform and uprights were in place at the mouth of the incline, and Rice's tools, a pick and shovel, were in the incline on said date.

The evidence is insufficient to justify the finding that, "the dividing line between the ground sold to plaintiff and the portion reserved by Gillis was established and agreed upon by defendant Gillis and plaintiff in the presence of Rice, and with the consent of Rice, at an oak tree about 26 feet easterly or northeasterly from the
mouth of said Rice Incline No. 1."

248 On the contrary it appears from the evidence that the oak
tree was agreed upon as a line beyond which plaintiff should not work westerly, and not as the dividing line between the Pine Tree mine and the Carrington mine.

The evidence is insufficient to justify the finding that, "after executing the deed of January 17th, 1886, to plaintiff the defendant Gillis located in his own name that portion of the old Carrington ground which was not included in his said transfer to plaintiff."

On the contrary it appears from the evidence that the location made by Gillis covered all of the old or original Carrington ground, and that his said location was made prior to the executing of the deed by him to the plaintiff.

The evidence is insufficient to justify the finding that, "the Pine Tree mine mentioned in the foregoing notice was and is the same ground conveyed by Gillis to plaintiff and described in the complaint; and the easterly boundary line of the ground described in said notice as the Carrington mine was and is the same line which Gillis and plaintiff established and agreed upon as the westerly boundary line of the ground conveyed by Gillis to plaintiff, and was and is the same line which Gillis and plaintiff established and agreed upon as marked by an oak tree 26 feet easterly or north-
easterly from the mouth of Rice Incline No. 1."

249 On the contrary the evidence shows that the easterly
boundary line of the ground conveyed by Gillis to plaintiff was not established and agreed upon as marked by an oak tree 26 feet easterly or northeasterly from the mouth of the Rice incline No. 1. The ground conveyed to plaintiff, as appears from the deed and from the complaint in this action, was 171 feet in width at each

end, and the westerly boundary line of the ground conveyed by Gillis to plaintiff, as appears from the evidence, lies a distance to the east of the oak tree mentioned.

The evidence is insufficient to justify the finding that "the mining claim described in the foregoing notice (plaintiff) is the same ground described in plaintiff's complaint, and is the same ground described in the deed of January 17th, 1886, from Gillis to plaintiff."

On the contrary, by comparing the notice mentioned with the deed and with the complaint, it is apparent that the ground described in the notice is not the same ground described in either the deed or the complaint. It appears from the testimony of the surveyor that surveyed the ground described in the deed, that the ground described in the notice is not the same ground described in the deed or in the complaint.

250 The evidence is insufficient to justify the finding that "in the month of December, 1887, the said F. B. Rice and defendant Voss applied to Gillis for permission to work and mine in said Rice incline or shaft No. 1 which had been sunk by Rice in 1885 and on the Rice vein. The said Gillis thereupon gave to Rice and Voss a verbal lease to work and mine on said Rice vein, reserving for himself as his rental or share one-fourth of all the gold which the — Rice and Voss might find."

On the contrary the evidence shows that in 1885 Rice leased from Gillis, and he had Gillis' permission to work the Rice vein for the period of five years; that Rice had not in 1887 relinquished to Gillis his right to work in and upon the Rice vein; that in December, 1887, Rice and Voss went to Gillis and asked of him if he had any objections to Voss working with Rice on the Rice vein, and Gillis at that time informed them that Voss could work with Rice, and thereupon Rice and Voss worked in and upon the Rice vein under the original lease from Gillis to Rice.

The evidence is insufficient to justify the finding that, "thereafter the said Rice and Voss commenced work in said incline or shaft and sunk down on said Rice vein and into the ground conveyed by Gillis to plaintiff, and described in the complaint, 251 until they reached the line of intersection of said Rice vein with the west vein, and then drifted or followed along the line of intersection of said veins in plaintiff's said ground, and excavated and removed from plaintiff's said ground a plane section of said west vein from 60 to 70 feet in length and from 10 to 20 feet in width, and wilfully and knowingly and without plaintiff's knowledge or consent and against his will, took out and removed from said line of intersection in plaintiff's said ground, and from said west vein in plaintiff's said ground, and appropriated to their own use, between the first day of February, 1888, and the 30th day of September, 1888, gold and gold-bearing earth and rock of the value of more than ten thousand dollars. The said gold and gold-bearing earth and rock was taken from the mining claim described in the complaint."

On the contrary it appears from the evidence that Rice and Voss did not wilfully or knowingly enter upon any portion of the ground described in plaintiff's complaint; that the only portion of the west vein removed by said Rice and Voss from the ground described in the complaint was a plane section thereof about 7 or 8 feet in length along the line of the intersection of the Rice and the west vein, and that from said portion of the said west vein so excavated no gold whatever was found by Rice and Voss; that Rice and Voss 252 did not remove from any ground described in the complaint or from any ground that in any way belonged to plaintiff either gold or gold-bearing earth or gold-bearing rock of the value of ten thousand dollars or of any value whatever; that it appears from the evidence that the Rice vein upon which said Rice and Voss worked has its apex on the Carrington claim; that said vein dips easterly and into and beneath the ground conveyed by Gillis to plaintiff; that the ground conveyed by Gillis to plaintiff was the Pine Tree mine, which was located as a mining claim in 1860; that the Carrington claim was located in 1854; that Rice and Voss would be entitled to retain for themselves any gold found by them at the line of the intersection of the Rice vein and the west vein, the apex of the latter vein being on the Pine Tree mine, which was located subsequent to the Carrington mine; that Rice and Voss took no gold-bearing earth or rock whatever from the mining claim in the complaint described.

The evidence is insufficient to justify the finding that "at the time of the purchase by plaintiff of the mining ground described in the complaint no work was being done on the old Carrington claim or any portion thereof, and the plaintiff did not know and had no means of knowing what agreement or arrangement had been 253 made between defendants Gillis and Rice regarding said claim or any portion thereof, and did not know and had no means of knowing that Gillis had made a verbal lease to Rice of the Carrington claim or any part thereof."

On the contrary, it appears from the evidence that Rice was at the time of the conveyance by Gillis to plaintiff at work in the incline sunk by him on the Rice vein, on the Carrington claim, and that Rice informed the plaintiff at the time Gillis and plaintiff were measuring the ground to be conveyed to plaintiff, that he claimed the veins upon which his incline had been sunk, that he intended to work the same, and for them not to interfere with his incline and works. That then and there Gillis told plaintiff that he should not work west of an oak tree 26 feet easterly from the mouth of Rice's said incline, and Gillis then and there reserved the Rice vein for Rice to work in and upon.

The evidence is insufficient to justify the finding wherein it is found that a bulkhead was erected in the excavation made by the parties, at a distance of about 12 feet from the Rice vein, and that it was agreed between the plaintiff and defendant Rice that such bulkhead should constitute a dividing line beneath the surface of their respective works."

254 On the contrary, it appears from the evidence that said

bulkhead was agreed upon between the parties as the dividing line between their respective claims beneath the surface.

The evidence is insufficient to sustain the finding that "the defendants J. N. Gillis, F. B. Rice and J. N. Voss were at all times jointly engaged and interested in the removal of said gold and gold-bearing earth and rock from plaintiff's ground, and the same to the value of more than ten thousand dollars was by them appropriated to their joint use and benefit. By the said removal and appropriation of said gold and gold-bearing earth and rock from plaintiff's mining claim described in the complaint, the plaintiff has sustained loss and damage in the sum of ten thousand dollars."

On the contrary, it appears from the evidence that the said defendants nor either of them have removed any gold nor gold-bearing earth or rock from any ground belonging to plaintiff of any value whatever, and that by no act of the defendants or either of them has the plaintiff sustained damage and loss in the sum of ten thousand dollars or in any sum whatever.

### III.

That said decision is against law.

1. The findings do not support the judgment.

255 2. That plaintiff is not entitled, as appears from the facts found by the court, to a judgment against defendants for the sum of $10,000 and costs or to a judgment for any sum whatever.

3. That upon the facts as found by the court the defendants were entitled to a judgment against plaintiff for their costs in this action.

And now comes the defendants pursuant to the notice hereinabove specified and make the above and foregoing their statement on motion for new trial, and move the court upon the grounds set forth in said statement to vacate and set aside the findings, decision and judgment of the court in this action against defendants, and to order a new trial of said action.

F. W. STREET AND J. F. ROONEY,
*Attorneys for Defendants.*

I hereby certify that the foregoing statement on motion for new trial in the above-entitled action was settled and allowed by me, and that the same is true and correct.

G. W. NICOL,
*Judge of Superior Court of Tuolumne County.*

Dated November 3rd, 1893.

Filed Nov. 3rd, 1893.

D. M. ORTEGA, *Clerk.*

256 *Order Overruling Motion for New Trial.*

Superior Court, Tuolumne County, State of California.

Tuesday, *Nov. 7th*, 1893.

Present: Hon. G. W. Nicol, judge; T. M. Yancey, sheriff; D. M. Ortega, clerk.

A. W. Stinchfield, Plaintiff,
*vs.*
J. N. Gillis *et al.*

In the above-entitled action, F. P. Otis, Esq., appeared for plaintiff and F. W. Street, Esq., for defendants.

Counsel for defendants now moves the court for a new trial of the above-entitled action, said motion being based upon the statement of the case settled by the court and on file in this action in the clerk's office.

Motion submitted to the court for its decision without argument.

It is by the court ordered that said motion for new trial of the above-entitled action be denied and overruled.

Defendants' counsel notes an exception.

Attest: D. M. ORTEGA, *Clerk.*

257 *Notice of Appeal.*

(Title of Court and Cause.)

To the plaintiff above named and to I. M. Kalloch and F. P. Otis, Esqrs., his attorneys:

You and each of you will please take notice that the defendants above named hereby appeal to the supreme court of the State of California from the judgment rendered in the above-entitled action against them in the superior court of the said county of Tuolumne, on the 21st day of June, 1893, and from the whole thereof; also from the order of said court made in said action on the 7th day of November, 1893, denying said defendants' motion for a new trial of said action.

F. W. STREET and J. F. ROONEY,
*Attorneys for Defendants.*

Dated January 5, 1894.

Due service of the above notice of appeal and receipt of a copy thereof hereby admitted the 5th day of January, 1894.

I. M. KALLOCH and F. P. OTIS,
*Attorneys for Plaintiff.*

Filed Jan. 5th, 1894.

D. M. ORTEGA, *Clerk.*

*Certificate.*

(Title of Court and Cause.)

258 I, D. M. Ortega, clerk of the superior court of the county of Tuolumne, State of California, do hereby certify that I have compared the foregoing transcript with the original papers one file in my office in the above-entitled action, and with all orders therein made and entered on the minutes of the court, and that the said transcript contains full, true and correct copies thereof, and is wholly correct.

I further certify that an undertaking on appeal in due form has been duly filed in my office in said action.

In witness whereof I have hereunto set my hand and affixed the seal of the said superior court this 10th day of February, 1894.

[SEAL.] D. M. ORTEGA, *Clerk.*

Due service of the foregoing transcript hereby admitted this 13th day of February, 1894.

I. M. KALLOCH AND F. P. OTIS,
*Attorneys for Respondents.*

259 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court, before you, between J. N. Gillis, John T. Faxon, administrator of the estate of F. B. Rice, deceased, and J. N. Voss, plaintiffs in error, and A. W. Stinchfield, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the sixth day of July next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid *be* inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal U. S. Circuit Court, Northern Dist. Cal.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 7th day of May, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

W. J. COSTIGAN,
*Clerk of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California.*

The above writ of error is hereby allowed.

W. H. BEATTY,
*Chief Justice of the Supreme Court of California.*

260 [Endorsed:] United States Supreme Court. J. N. Gillis *et al.*, plaintiffs in error, *vs.* A. W. Stinchfield, def't in error. Original writ of error.

261 In the Supreme Court of the State of California.

| | |
|---|---|
| A. W. STINCHFIELD, Plaintiff and Respondent,<br>*vs.*<br>J. N. GILLIS, JOHN T. FAXON, Administrator of the Estate of F. B. Rice, Deceased, and J. N. Voss, Defendants and Appellants. | In Law. Petition for Writ of Error. |

And now comes J. N. Gillis, John T. Faxon, administrator of the estate of F. B. Rice, deceased, and J. N. Voss, defendants herein, and say that on or about the 5th day of April, 1895, this court entered judgment herein in favor of plaintiff, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of these defendants; all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore these defendants pray that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

F. W. STREET AND
J. F. ROONEY,
*Attorneys for Defendants.*

Allowed.
May 20, 1895.
W. H. BEATTY,
*Chief Justice of California.*

262 [Endorsed:] Petitions for writ. 18315. In the supreme court of the State of California. A. W. Stinchfield, plaintiff and respondent, *vs.* James N. Gillis, John T. Faxon, administrator of the estate of F. B. Rice, deceased, and J. N. Voss, defendants and appellants. Copy petition for writ of error. Filed Jun- 14, 1895. T. H. Ward, clerk, by R. A. Marshall, deputy. F. W. Street and J. F. Rooney, att'ys for def'ts.

263 In the Supreme Court of the State of California.

A. W. STINCHFIELD, Plaintiff,
*vs.*
JAMES N. GILLIS, JOHN T. FAXON, Administrator of the Estate of F. B. Rice, Deceased, and JOHN N. VOSS, Defendants.

The defendants in this action, in connection with their petition for a writ of error from the Supreme Court of the United States to the honorable judges of the supreme court of the State of California, make the following assignment of error and say that in the records and proceedings in said action there is manifest error in this:

1st. That the supreme court of the State of California erred in adjudging that the mining laws of the United States, and especially section 2336 of the Revised Statutes of the United States, were not applicable to the solution of the controversy between the plaintiff and defendants herein.

2nd. That the supreme court of the State of California erred in disregarding and misconstruing the mining laws of the United States, and especially section 2336 of the Revised Statutes, in determining the ownership of the subject-matter of the controversy between plaintiff and defendants, in this: the paramount title to the land in controversy was in the United States, and it consists 264 of two mining claims, one of which was known as the Carrington mine and the other as the Pine Tree mine, the former being located in 1854, the latter in 1859 or 1860, and were held by the locator as two separate and distinct claims down to the year 1872, when the defendant Gillis, by purchase, became the owner of said claims, and he held them as separate and distinct claims until the year 1886, when he sold the Pine Tree mine to the plaintiff Stinchfield; that the defendant Gillis and his codefendants and lessees, Rice and Voss, discovered the gold in controversy in this action at the intersection of two veins, one of which apexed upon the Carrington mine, the other upon the Pine Tree mine; that defendants claimed and appropriated the gold found at the intersection of said veins under and by virtue of the mining laws of the United States, and especially under section 2336 of the Revised Statutes.

3rd. That the supreme court of the State of California erred in deciding that the mining laws of the United States and the mining customs were not applicable to the facts in this case, and in holding that plaintiff Stinchfield was entitled to all the gold at the point of the intersection of the two veins.

4th. That the supreme court of the State of California erred in adjudging that all the gold found in the space of the intersection of these two veins belonged to the plaintiff Stinchfield, because even if the findings of the court that these claims were held by the defendant Gillis as one claim were warrented by the evidence, then the gold at the space of the intersection of these veins was the 265 joint property of the plaintiff and the defendants, and the ownership to which would be determined in accordance with the spirit and manifest objects of the mining statutes of the United States which govern, regulate, and determine the ownership of the gold and ore at the space of intersecting and uniting veins in the public mineral lands of the United States.

5th. The supreme court of the State of California further erred in adjudging that the plaintiff Stinchfield, by reason of his deed from the defendant Gillis, was entitled to all the minerals within the Pine Tree mine, in this: that under the mining statutes of the United States the defendant Gillis was the owner of all the veins apexing on the Carrington mine, and he was and is entitled to follow those veins upon their dip, within the vertical end lines of the Carrington mine, into and through the Pine Tree mine.

Wherefore the said defendants, James N. Gillis, John T. Faxon, administrator of the estate of F. B. Rice, deceased, and John N. Voss, pray the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the said judgment, etc.

F. W. STREET AND
J. F. ROONEY,
*Attorneys for Defendants.*

266 [Endorsed:] 18315. In the supreme court of the State of California. A. W. Stinchfield, plaintiff and respondent, *vs.* James N. Gillis, John T. Faxon, administrator of estate of F. B. Rice, deceased, and J. N. Voss, defendants and appellants. Assignment of errors. Filed Jun- 14, 1895. T. H. Ward, clerk, by R. A. Marshall, deputy. T. W. Street and J. F. Rooney, att'ys for def'ts and appellants.

267 In the Supreme Court of the State of California.

A. W. STINCHFIELD, Plaintiff,
*vs.*
J. N. GILLIS, JOHN T. FAXON, Administrator of the Estate of F. B. Rice, Deceased, and J. N. Voss, Defendants. } At Law. No. 18315.

This 20th day of May, 1895, came the defendants, by their attorneys, and filed herein and presented to the court their petition praying for the allowance of a writ of error intended to be urged by them, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of error upon the defendants' giving bond according to law in the sum of fifteen thousand dollars *dollars*, which shall operate as a supersedeas bond.

May 20, 1895.

W. H. BEATTY,
*Chief Justice of the Supreme Court of California.*

268 [Endorsed:] 18315. In the supreme court of the State of California. A. W. Stinchfield, plaintiff and respondent, *vs.* James N. Gillis, John T. Faxon, administrator of estate of F. B. Rice, deceased, and J. N. Voss, defendants and appellants. Order allowing writ of error. Filed Jun- 14, 1895. T. H. Ward, clerk, by R. A. Marshall, deputy.

269 In the Supreme Court of the United States, —— Term, 1895.

THE UNITED STATES OF AMERICA, *ss:*

To A. W. Stinchfield, Greeting:

You are hereby cited and admonished to be and appear at *at* a session of the Supreme Court of the United States, to be holden at the city of Washington, D. C., on the 14th day of October next, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of California, wherein J. N. Gillis, John T. Faxon, administrator of the estate of F. B. Rice, deceased, and J. N. Voss are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 4th day of June, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States of America the one hundred and nineteenth.

W. H. BEATTY,
*Chief Justice of California.*

270 We hereby, this 6th day of June, 1895, accept due personal service of the within citation on behalf of A. W. Stinchfield, plaintiff and respondent in the action within named and the defendant in error named therein.

I. M. KALLOCH AND
F. P. OTIS,
*Attorneys for A. W. Stinchfield, Defendant in Error.*

271 [Endorsed:] 18315. In the supreme court of the State of California. A. W. Stinchfield, plaintiff and respondent, *vs.* James N. Gillis, John T. Faxon, administrator of estate of F. B. Rice, deceased, and J. N. Voss, defendants and appellants. Citation. Filed Jun- 14, 1895. T. H. Ward, clerk, by R. A. Marshall, deputy. F. W. Street and J. F. Rooney, att'ys for def'ts & appellants.

272 Feb.

STINCHFIELD, Respondent,
*v.* No. 18315.
GILLIS *et al.*, Appellants.

Upon the former appeal in this case (96 Cal., 33) it appeared that the Carrington mine was a single claim held by the defendant

Gillis, of which he had sold a portion to the plaintiff, and it was held that by virtue of his deed to the plaintiff Gillis was estopped from questioning the right of his grantee to all of the gold found within the surface lines of the deed, irrespective of the depth below the surface at which it was found. After the case went down to the superior court for another trial, the defendants amended their answers, presenting issues to the effect that the tract of ground which was sold to the plaintiff was known as the Pine Tree claim and was distinct from that known as the Carrington claim, which was retained by Gillis and had been located subsequent to the location of the Carrington claim; that upon these facts they were entitled to the gold found at the place of intersection of the Rice vein and the West vein, although that place of intersection was within the surface lines of the grant to the plaintiff. Upon the issues thus presented the court found that for nearly fourteen years prior to the sale to the plaintiff the mining ground held by the defendant Gillis, including that sold to the plaintiff, had been held and claimed by him as a single mining claim and was known and designated as the "Carrington" claim, and that during that time no Pine Tree mine or claim had existed; that prior to the sale and conveyance to the plaintiff Gillis had pointed out to him the boundaries of the Carrington claim and told him that the ground so sold and conveyed was a part of that claim; that before the execution of the deed Gillis and the plaintiff went together upon the ground and marked off and agreed upon the portion of the claim to be sold to the plaintiff, and established visible monuments at each of the four corners, and agreed upon the dividing line between the portion to be sold to the plaintiff and the portion to be re- 273 tained by the defendant, and established and agreed upon permanent monuments marking said dividing line; that the ground was conveyed according to these monuments and in the conveyance to the plaintiff was designated as the Pine Tree mine for the purpose of distinguishing it from the remaining part of the Carrington claim retained by Gillis. In 1854 the Carrington claim was located for 1,000 feet on each side of the vein, and in 1859 or 1860 T. E. Carrington, then being in possession of the Carrington claim, posted notices on the Pine Tree vein, adjacent thereto on the east, claiming 300 feet along said vein. Carrington remained in possession of this property until some time in 1870, when he moved away from the county, leaving the whole of the mining ground in charge of one Stoker and instructed him to do the assessment-work thereon. Stoker took possession of the entire ground in which the Carrington and Pine Tree veins lay and held it for Carrington as one claim until June, 1872, and during this time the entire ground was held and known as the Carrington claim, and all the assessment-work that was done upon the ground was done as and for the Carrington claim. In June, 1872, Carrington sold to the defendant Gillis his interest in the mining ground, the deed of conveyance including claims on all sides of the Pine Tree mine, but not mentioning any claim or mining ground by that name, and upon the execution of this deed Stoker turned over to Gillis the possession of all the grounds that he had been holding for Carrington, and Gillis remained in possession thereof until his conveyance to the plaintiff in 1886. Upon these facts the court rendered judgment in favor of the plaintiff. The defendants have appealed.

We are of the opinion that the additional facts presented upon this appeal do not take the case out of the principles under which the decision on the former appeal was given. The mining ground held by Carrington, of which Gillis took possession under his deed of June, 1872, must be considered as a single claim, irrespective of the original locations of the different parts of the claim. Whatever distinction may have been at one time observed between the original location of the Carrington mine and that of the Pine Tree mine, it was disregarded by Carrington during a large portion of the time these claims were held by him, and after he left the county the entire mining ground, which included them both, was treated
274 as one claim, not only while Stoker held them, but also during all the time that Gillis held them, until his conveyance to the plaintiff. That conveyance did not purport to be made in accordance with the lines or claim of any previous location, but was a conveyance of a tract of mining ground carved out of another tract, known as the "Carrington" claim, by metes and bounds agreed upon between the parties and which they both treated as a part of the Carrington claim, but which for the sake of conveyance was designated in the conveyance as the Pine Tree claim.

Under these facts the conveyance from Gillis to the plaintiff must have the same effect as though the entire ground held by him previous to the conveyance was held by mere possession or under a patent from the United States, or as if the two veins were a part of the same location. At the former appeal herein it was held that if the locator of a mining claim should convey a portion of his claim without any reservation in his deed of conveyance, his grantee would be entitled to all the gold that might be found within the ground conveyed in any vein whose apex was within the surface lines of his deed; so, if a locator should convey to A the east half of his claim and afterwards should convey the west half to B, each of his grantees would in the same manner be entitled to all of the gold found in any vein which was entirely within the surface lines of his conveyance; and, on the same principle, if the proprietor of a tract of mining ground which has been derived from several locations should dispose of the same in parcels, irrespective of the lines of such location, the rights of his grantees would be measured by the terms of their deeds. In such cases sec. 2336 of the Revised Statutes of the United States has no application. That statute was not intended to limit or define the rights of a person in mere possession of a tract of mining ground where there is more that one vein, or to prescribe the effect of a conveyance by the locator of a claim of a portion of his location containing one of such veins. The object of the statute was to supplement the provisions of sec. 2332, and to prescribe rules under which different locations by different proprietors should be held, and to determine the rights of such proprietors in case
275 of intersecting veins. At the date of the passage of that act,

May 10, 1872, the Carrington claim was, and had for many years been, held as a single claim, without any adverse claim thereto, and it continued so to be held until the conveyance by Gillis to the plaintiff in 1886. The position of the proprietor of a mining claim who conveyed a portion thereof and retains the remainder is analagous to the position of the United States after it has issued its patent for a location. As the United States, as well as a subsequent locator, holds the unpatented claim subject to the prior rights of the patentee, as prescribed by sec. 2336, so the grantor of a portion of his claim, in the absence of any reservation in his deed or proof of mining customs, holds the ungranted portion subordinate to the rights of his grantee in the ground conveyed.

The effect of the deed from Gillis to the plaintiff was to estop him and those claiming under him from questioning the title of the plaintiff to all of the gold that might be found in the west vein within the surface lines of his deed. The gold in controversy was found within the surface lines of this deed, and it was also found within the limits of the two walls forming the west vein, although the place at which it was found is also within the lines of the -alls which form the Rice vein. This latter circumstance does not, however, relieve Gillis from the estoppel of his deed, for, as the deed contains no reservation and as there was no evidence at the trial of any mining customs, effect must be given to the deed according to its terms by holding that the entire west vein within the surface lines, even though intersected by another, passed to the plaintiff. In thus holding we concede that when mining ground is conveyed by deed without express limitation the grantee takes subject to the characteristice of mining property given to it by prevailing customs and laws, and not with the absolute dominion which flows from a conveyance in fee of ordinary land. The mining thus granted is still subject to all mining laws and customs which are applicable, but the provision of sec. 2336, that when two veins intersect "priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection," cannot possibly be applied to the case where A conveys part of his 276 mining claim to B, for in such a case there is no "prior location." Therefore in such a case the ordinary rules which govern grants of land must of necessity apply, and if the intersection takes place on part of the claim conveyed, the grantee takes all the mineral within the space of intersection.

Whether the plaintiff would have been entitled to follow the west vein into the ground retained by Gillis and to claim the gold found therein, or whether Gillis would have been entitled to any of the gold that might be found in the Rice vein within the ground conveyed to the plaintiff are questions which are not involved in this appeal and upon which we do not express any opinion. All that we hold is that, inasmuch as the gold in question was within the ground conveyed by Gillis to the plaintiff and in a vein whose apex was within the surface lines of that ground, it belonged to the plaintiff.

Certain rulings of the court upon the admission of evidence to show the boundaries of the lands described in the deed from Gillis to the plaintiff are assigned as error, but we are of the opinion that the rulings were correct. The description in the complaint follows that in the deed from Gillis to the plaintiff, and in addition to giving the length of each side of the ground designated certain monuments as corners of the tract conveyed. If these monuments can be ascertained they will prevail over the designated measurements, and the evidence offered was for the purpose of pointing out upon the surface of the earth the monuments which had been agreed upon in the sale and which were named in the conveyance. For this purpose the court was authorized to receive parol evidence in order to show the identity of the land so conveyed with that upon which the trespass was committed.

The judgment and order are affirmed.

HARRISON, *J.*

We concur.

McFARLAND, *J.*
VAN FLEET, *J.*

277 *Concurring Opinion.*

While I do not think the decision in this case upon the former appeal is all-conclusive as to the questions raised by the present appeal, still I concur in the judgment upon the ground that the facts do not bring the case within the provisions of sec. 2336 of the Revised Statutes; and, when that statute does not apply and there is no other law or mining custom applicable to the facts, I think the grantee of the surface ground must be held to take all the mineral at the point of intersection. Again, it is not clear to me that the gold at the point of intersection can be said to be located in the west vein any more than that it was located in the Rice vein.

GAROUTTE, *J.*

278 In the Supreme Court of the State of California.

A. W. STINCHFIELD, Plaintiff,
*vs.*
JAMES N. GILLIS, JOHN T. FAXON, Administrator of the Estate of F. B. Rice, Deceased, and JOHN N. VOSS, Defendants.

Know all men by these presents that we, James N. Gillis, John T. Faxon, as administrator of the estate of F. B. Rice, deceased, and John N. Voss, as principals, and Henry Williams, James Treadwell, John Treadwell, H. A. Williams, and Jacob C. Johnson, as sureties, are held and firmly bound to the plaintiff, A. W. Stinchfield, in the full and just sum of fifteen thousand dollars ($15,000), to be paid to the said plaintiff, A. W. Stinchfield, his certain attorneys, executors, administrators, or assigns, in the following sums, to wit, said principals in the sum of fifteen thousand dollars and the said sureties in the following sums, to wit: Henry Williams, in the sum of six thousand dollars; James Treadwell, in the sum of six thousand dollars;

John Treadwell, in the sum of six thousand dollars; H. A. Williams, in the sum of six thousand dollars; J. C. Johnson, in the sum of six thousand dollars; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of May, 1895.

Whereas lately, in the supreme court of the State of California, in a suit pending in said court between A. W. Stinchfield, plaintiff and respondent, and James N. Gillis, John T. Faxon, administrator of the estate of F. B. Rice, deceased, and John N. Voss, defendants and appellants, a judgment was rendered against the said 279 James N. Gillis, John T. Faxon, administrator of the estate of F. B. Rice, deceased, and John N. Voss, and the said James N. Gillis, John T. Faxon, administrator of the estate of F. B. Rice, deceased, and John N. Voss having obtained a writ of error and filed a copy thereof in the clerk's office of the said supreme court of the State of California to reverse the judgment in the aforesaid suit, and a citation directed to the said A. W. Stinchfield, citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, D. C., on the — day of —— next:

Now, the condition of the above obligation is such that if the said James N. Gillis, John T. Faxon, administrator of the estate of F. B. Rice, deceased, and John N. Voss shall prosecute said writ of error to effect and answer all damages and costs if they fail to make good said plea, then the above obligation to be void; else to remain in full force and virtue.

JAMES N. GILLIS. [SEAL.]
JOHN T. FAXON, [SEAL.]
*Administrator of the Estate of F. B. Rice, Deceased.*
JOHN N. VOSS. [SEAL.]
HENRY WILLIAMS. [SEAL.]
JAMES TREADWELL. [SEAL.]
JOHN TREADWELL. [SEAL.]
H. A. WILLIAMS. [SEAL.]
JACOB C. JOHNSON. [SEAL.]

Sealed and delivered in presence of—

—— ——.

The foregoing bond is hereby approved.
June 4, 1895.

W. H. BEATTY,
*Chief Justice of California.*

280 STATE OF CALIFORNIA, } ss:
*City and County of San Francisco,* }

Henry Williams, James Treadwell, John Treadwell, H. A. Williams, and J. C. Johnson, whose names are subscribed to the within bond as sureties thereto, being severally duly sworn, each for himself deposes and says that he is a resident and householder within said county and State; that he is worth the amount for which he becomes surety on said bond, over and above all debts and liabilities, in unincumbered property situate within this State, exclusive of property exempt from execution and forced sale.

HENRY WILLIAMS.
JAMES TREADWELL.
JOHN TREADWELL.
H. A. WILLIAMS.
J. C. JOHNSON.

Subscribed and sworn to before me this 27th day of May, 1895.

[SEAL.] SAMUEL ROSENHEIM,
*Notary Public.*

Endorsed: No. 18315. Filed June 14, 1895. T. H. Ward, clerk, by R. A. Marshall, deputy.

281 18315.

| | |
|---|---|
| A. W. STINCHFIELD, Respondent,<br>*vs.*<br>J. N. GILLIS, JOHN T. FAXON, Adm. of the Estate of F. B. Rice, Deceased, and J. N. Voss, Appellants. | I. M. Kallock, F. P. Otis.<br>F. W. Street and J. F. Rooney. |

1895, April 5.—Judgment and order are affirmed.

HARRISON, *J.* (B.)

We concur.

McFARLAND, *J.*
VAN FLEET, *J.*

Concurring opinion by Garoutte, J.

282 In the Supreme Court of the State of California.

I, T. H. Ward, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of transcript and papers on appeal to the Supreme Court of the United States as shown by the records of my office.

Witness my hand and the seal of the court this 14th day of June, A. D. 1895.

[Seal Supreme Court of California.]

T. H. WARD, *Clerk*,
By R. A. MARSHALL, *Deputy.*

Endorsed on cover: Case No. 15,951. California supreme court. Term No., 661. J. N. Gillis, John T. Faxon, administrator of the estate of F. B. Rice, deceased, and J. N. Voss, plaintiffs in error, *vs.* A. W. Stinchfield. Filed July 19, 1895.

US658

(Copy)

Office Supreme Court, U. S.
FILED.
OCT 15 1895
JAMES H. McKENNEY,
CLERK.

No. 661.

# IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

J. N. GILLIS ET AL., PLAINTIFFS IN ERROR,

*vs.*

A. W. STINCHFIELD, DEFENDANT IN ERROR.

## MOTION TO DISMISS WRIT,

**United with Motion to Affirm.**

M. A. WHEATON,
I. M. KALLOCH,
F. J. KIERCE,
*Attorneys for Defendant in Error.*

[illegible]

# IN THE SUPREME COURT

OF THE

# UNITED STATES.

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J. N. GILLIS, JOHN T. FAXON (ADMINISTRATOR OF THE ESTATE OF F. B. RICE, DECEASED), AND J. N. VOSS,
*Plaintiffs in Error,*

vs.

A. W. STINCHFIELD, *Defendant in Error.*

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## MOTION TO DISMISS WRIT OF ERROR AND TO AFFIRM JUDGMENT.

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Come now the defendants in error above named, by their counsel, M. A. Wheaton, I. M. Kalloch and F. J. Kierce, and respectfully move this Court for an order dismissing the writ of error herein, and also respectfully move this Court for a further order affirming the judgment of the Supreme Court of the State of California against the plaintiffs in error herein.

This motion is made for the following reasons and upon the following grounds, to wit:

1.

There is no Federal question arising from the record filed in this Court.

2.

The record shows that no Federal question was ever presented to the Supreme Court of the State of California on appeal from the trial court.

3.

No Federal question was ever raised by the pleadings in the case. No right, title, privilege, or immunity under the Constitution, or any treaty or statute of, or commission held, or authority exercised, under the United States appears by the record to have been pleaded or specially set up or claimed.

4.

No Federal question is necessarily involved in the judgment of the Court below.

5.

The decision of the Court below was clearly based upon an estoppel which was deemed to operate against the plaintiffs in error under general principles of law and the statutes of California, irrespective of any Federal question whatever.

6.

Section 2336 of the United States Revised Statutes was the only Federal law or statute invoked or considered in the Supreme Court below, and that Court, while conceding the validity of the statute, expressly held, as appears in its decision, which is a part of the record herein, that there were no facts in this case to bring it within the purview of that section, and based its judgment upon a ground entirely independent of that statute.

7.

If there is a Federal question involved in the judgment of the Court below, the decision of that Court is so clearly right that the writ of error should be dismissed and the judgment affirmed.

8.

It is manifest that the writ was taken for delay only.

9.

The question on which jurisdiction depends is so frivolous as not to need further argument.

M. A. Wheaton,
J. M. Kalloch,
H. J. Knice.
Attorneys for Defendant in Error.

(Notice of the foregoing motion was duly served on J. C. Campbell, Esq., counsel of record for plaintiffs in error, at San Francisco, Cal., on the 30th day of September, 1895, together with a copy of the Brief of defendant in error, and on Messrs. F. W. Street and J. F. Rooney, attorneys for plaintiffs in error in the California Courts, together with a copy of said Brief, on the second day of October, 1895. Proof of service of notice and Brief is on file in the office of the Clerk of this Court.)

Office Supreme Court U. S.
FILED.
OCT 15 1895
JAMES H. McKENNEY,
CLERK.

No. 661.

# IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

J. N. GILLIS ET AL., PLAINTIFFS IN ERROR,

*vs.*

A. W. STINCHFIELD, DEFENDANT IN ERROR.

## IEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS WRIT OF ERROR.

M. A. WHEATON,
I. M. KALLOCH,
F. J. KIERCE,
*Attorneys for Defendant in Error.*

[illegible]

# IN THE SUPREME COURT

OF THE

# UNITED STATES.

J. N. GILLIS, JOHN T. FAXON (ADMINISTRATOR OF THE ESTATE OF F. B. RICE, DECEASED), AND J. N. VOSS,

*Plaintiffs in Error.*

VS.

A. W. STINCHFIELD,

*Defendant in Error.*

## BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS WRIT OF ERROR AND TO AFFIRM JUDGMENT.

This is a motion to dismiss a writ of error directed to the Supreme Court of the State of California, united with a motion to affirm the judgment of said Supreme Court. For convenience, we shall refer to the plaintiffs in error as "Gillis," and to the defendant in error as "Stinchfield."

## STATEMENT OF THE CASE.

The action was originally commenced in a Superior Court of the State of California by the filing of a complaint which averred Stinchfield's ownership of a mining claim and Gillis's wrongful entry and wrongful appropriation of gold. Gillis answered, simply denying the alleged entry, and denying any wrongful appropriation. No Federal question was raised by the pleadings. No right, title, privilege, or immunity under any Federal treaty, statute, commission, or authority was set up or claimed in the answer. Upon such pleadings the cause was tried. At the trial the evidence proved and the Court found the facts to be that for many years Gillis had been in possession and claiming to own a mining claim known as the "Carrington;" that he had sold and by bargain and sale deed had conveyed a portion of the claim to Stinchfield; that prior to the sale by Gillis to Stinchfield no "location" of the Carrington claim had ever been made by Gillis or by any predecessor in interest; that immediately after executing the deed to Stinchfield, Gillis located that portion of the claim which he retained, and denominated his location the "Carrington;" that afterwards Stinchfield located the ground he had purchased and denominated the same as the "Pine Tree" claim; that thereafter Gillis entered upon the ground that he had sold to Stinchfield, and from the space of intersection of two veins, one of which had its apex in that portion of the old claim which Gillis had retained, and the other of which had its apex in the ground sold to Stinchfield, he took out and appropriated a large amount of gold. The trial Court also found that after this appropriation of gold by Gillis, the respective parties had agreed upon a dividing line between their claims, which left the space of vein intersection from which the gold had been taken entirely in the ground which had been retained by Gillis. Upon the facts thus found, the trial Court gave judgment for Gillis.

An appeal was then taken to the Supreme Court of the State, where the judgment of the lower Court was reversed (*Stinchfield* vs. *Gillis*, 96 Cal. 33. See appendix to this Brief) While the record which went up on this appeal contained no specific reference to any Federal question, and disclosed no claim on the part of Gillis to any right, title, privilege or immunity under any Federal law, still the Supreme Court was of the opinion that the judgment of the lower Court must have been due to that Court's interpretation of Section 2336 of the United States Revised Statutes. In other words, that the lower Court must have concluded that Gillis had priority of title to the space of vein intersection by reason of the location which he made after the execution of his deed to Stinchfield, but before the location by Stinchfield of the ground conveyed to the latter—there having been no earlier location at all of any part of the ground. The judgment of the lower Court was otherwise inexplicable, as it was distinctly found that the gold appropriated by Gillis *was taken* from the ground which he had sold to Stinchfield, as charged in the complaint. Thus the Supreme Court said (96 Cal. 36): "This is necessarily the fact, for the Court finds in "express terms that the gold was taken from the point of inter-"section of the veins to which reference has already been made, "and that such point of intersection was upon the Pine Tree "Mine." Upon this first appeal to the Supreme Court of the State *the record contained nothing in the nature of a Federal question* *for the Court to review or pass upon.* The opinion of the Supreme Court (96 Cal. 33) on this first appeal contains the *first reference* to any Federal question which can be found in the history of the case, outside the arguments of counsel. But it will be observed that the decision of the Supreme Court was not based upon any Federal question, but rested entirely upon the estoppel operating against Gillis, under the laws of California, by reason of his bargain and sale deed to Stinchfield.

"As between the plaintiff and Gillis, the locations of their re-
" spective mines, made subsequent to the deed of Gillis, are not
" material to any matter involved in this litigation. By bargain
" and sale deed Gillis conveyed the Pine Tree Mine to plaintiff,
" particularly designating its surface boundaries. These parties
" occupy the relative positions of grantor and grantee, under a
" bargain and sale deed, with all the rights and obligations
" peculiar to that relation, and it is elementary that Gillis, by a
" subsequent location or otherwise, could not obtain any title
" which he could assert against his grantee, and thereby defeat
" or limit his grantee's estate, or destroy or limit any easement
" or right appurtenant thereto, and necessary to the enjoyment
" of a perfect title. By his deed, respondent Gillis was es-
" topped from denying his own title in fee at the date of that
" conveyance, and therefore necessarily estopped from denying
" a valid location by himself or his grantor as the basis of such
" title" (96 Cal., p. 36.)

"The deed of Gillis passed to the plaintiff the Pine Tree
" Mine, to the same extent and to the same effect that a patent
" from the United States would have passed it; that is, as against
" the grantor, he was vested with the title to this mining claim,
" including every vein and every part of every vein throughout
" its depth which had its apex within the surface boundaries of
" the claim, subject to the provisions of the Revised Statutes of
" the United States heretofore quoted." (96 Cal., p. 37.)

The case having been remanded to the Superior Court for trial anew, certain of the defendants there amended their answers, but still no Federal question was raised by the pleadings, and no right, title, privilege, or immunity under any Federal treaty, statute, commission, or authority was set up or claimed in the answers or in any of them. At the second trial, Gillis attempted to show that the mining ground, a portion of which he had sold to Stinchfield, had *not* in fact previously constituted one claim, as he had testified that it did on the first trial, but that it had really consisted of two claims, and that the ground retained by him when he sold to Stinchfield was substantially identical with one of these two claims, and that the ground sold by him to Stinchfield was substantially identical with the other of the two claims, and that the location of the ground retained by himself had been made prior to the location of the ground sold to Stinchfield.

The Court found that during many years Gillis had held and claimed to own *as one mining claim*, known as the Carrington, the ground out of which he sold a portion to Stinchfield; that he had shown Stinchfield the boundaries of the Carrington mine, including the ground sold to Stinchfield, and had assured Stinchfield that the ground about to be purchased by the latter was a portion of the Carrington; and that the ground sold to Stinchfield had been known as a part of the Carrington claim and not otherwise. The Court also found, as had been found at the first trial, the sale and conveyance by bargain and sale deed from Gillis to Stinchfield, the subsequent location by each of his respective part, and the subsequent entry by Gillis upon the ground sold by him to Stinchfield and his appropriation of gold therefrom. Upon the facts thus found, the trial Court gave judgment for the plaintiff, Stinchfield.

A second appeal was then taken to the Supreme Court of the State and the judgment of the lower Court was affirmed by the Supreme Court sitting in bank. (Record, p. 120.)

The record on this second appeal presented no Federal question for the Supreme Court of the State to review or pass upon. Neither in the answers (Record, pp. 2–8), nor in the specification of errors (Record, p. 105), nor in the points in which the decision of the trial Court was alleged to be against law (Record, p. 114), was any Federal question raised, or any right, title, privilege, or immunity under any Federal statute set up or claimed. It is but fair to state, however, that counsel for Gillis contended in argument that Gillis was justified in appropriating the gold taken by him from the ground which he had sold to Stinchfield by virtue of the provisions of Section 2336 of the Revised Statutes. The Supreme Court of the State, however, held that no additional facts were presented upon the second appeal which would "take the case out of the principles under which "the decision of the former appeal was given."

(We have taken the liberty to append to this brief the decision on the former appeal (96 Cal. 33) for convenient reference.)

## POINTS AND AUTHORITIES.

*The record taken to the Supreme Court of the State on appeal from the trial court presented no Federal question for review.*

Neither in the pleadings (Record, pp. 1–9), nor in the proceedings during the trial, nor in the assignments of error (Record, pp. 105–114), was any Federal question raised, nor was any right, title, privilege, or immunity of a Federal nature set up or claimed. No error of the trial court relative to any such question was suggested. The alleged "errors in law" (Record, p. 105) relate solely to the admission or rejection of testimony which had nothing to do with any Federal question. The alleged "insufficiency of the evidence to justify the decision" (Record, p. 108) is a matter the consideration of which was concluded in the State Courts, as this Court will not review any question of fact, credibility of testimony, or conflict in evidence.

*Gormley* v. *Clark*, 134 U. S. 348.
*Israel* v. *Arthur*, 152 U. S. 362.
*Sayward* v. *Denny*, 158 U. S. 186.

The specification of alleged error upon the ground that the decision was "against law" (Record, p. 114) did not raise any Federal question, nor point out any denial of a right, title, privilege, or immunity set up or claimed under a Federal law. Therefore, the record upon which the Supreme Court of the State pronounced its judgment presented no Federal question to that court to be reviewed. It has frequently been held that the range of judicial inquiry within which the Supreme Court of the State was called upon to review the decision of the trial court is the range within which this Court may be asked, if at all, to review the former tribunal. That a Federal statute was invoked for the first time in the argument of counsel, and that its bearing upon the case was thereafter referred to by the Court, is not the setting up or claiming of a right, title, privilege, or immunity, which entitles to a review in this court:

"It is probable that counsel, in the argument of the case in "the Supreme Court of Iowa, insisted that these matters were "involved, and that the Chief Justice felt bound to certify, when "requested, that they were drawn in question. But if the record "does not show that they were necessarily drawn in question, "this Court cannot take jurisdiction to reverse the decision of "the higher Court of a State, upon the ground that counsel "brought them in question in argument."

*R. R. Co.* v. *Rock*, 4 Wall. 180.

"It must appear in the pleadings of the suit, or from the evi-"dence in the course of trial, in the instructions asked for, or "from exceptions taken to the ruling of the Court. It must be "that such a question was necessarily involved in the decision, "and that the State Court would not have given a judgment "without deciding it."

*Lawler* v. *Walker*, 14 How. 152.

"We have often decided that it is not enough to give us juris-"diction over the judgments of the State Courts for the record "to show that a Federal question was argued or presented to "that Court for decision. It must appear that the decision was "necessary to the determination of the cause, and that it was "actually decided, or that the judgment as rendered could not "have been given without deciding it."

*Brown* v. *Atwell* 92 U. S. 329.

In *Citizens' Bank* v. *Board of Liquidation*, 98 U. S. 141, because no Federal question was specially raised by the pleadings, and the record showed on its face that the decision of such a question was not necessarily involved, the Court, by Chief Justice Waite, declined to go through the opinion of the State Court to ascertain whether such a question was in fact decided.

"To give us jurisdiction under Section 709 of the Revised "Statutes because of the denial by a State Court of any title, "right, privilege, or immunity claimed under the Constitution, "or any treaty or statute of the United States, it must appear "on the record that such title, right, privilege, or immunity "was 'specially set up or claimed' at the proper time in the "proper way. To be reviewable here, the decision must be "against the right so *set up or claimed*. As the Supreme Court "of the State was reviewing the decision of the trial Court, it "must appear that the claim was made in that Court, because "the Supreme Court was only authorized to review the judg-"ment for errors committed there, and we can do no more."

*Spies* v. *Illinois*, 123 U. S. 181.
*Miller* v. *Texas*, 153 U. S. 539.
*Sayward* v. *Denny*, 158 U. S. 180.

*The decision of the Court below was clearly based upon the estoppel which was deemed by that Court to operate against the plaintiffs in error under general principles of law and the statutes of California, irrespective of any Federal question whatever.*

In the decision of the State Supreme Court on the first appeal (96 Cal. 33), the principle of estoppel is obviously that upon which the judgment rested.

In the decision upon the second appeal (Record pp. 122–123) Justice Harrison said: "We are of the opinion that the additional facts presented upon this appeal do not take the case out of the principles under which the decision on the former appeal was given. * * * * The effect of the deed from Gillis to the plaintiff was to estop him and those claiming under him, from questioning the title of the plaintiff to all of the gold that might be found in the west vein within the surface lines of his deed."

The conveyance from Gillis to Stinchfield was by the specific definition of the Civil Code of California a grant, and the effect and operation of a grant are by the provisions of that Code explicitly defined (Cal. Civil Code, Title IV, Chaps. 1 and 2). The application of the doctrine of estoppel by the State Court, in accordance with the State statutes, as well as in accordance with general legal principles, will not be disturbed.

*Gormley* v. *Clark*, 134 U. S. 348.

Where a question is disposed of in the State Court by the application of the doctrine of estoppel, under principles of general law, a Federal question, if any be involved, will not be reviewed.

*Brown* v. *Atwell*, 92 U. S. 329.
*Choteau* v. *Gibson*, 111 U. S. 200.
*Adams County* v. *B. & M. R. R. Co.*, 112 U. S. 128.
*Israel* v. *Arthur*, 152 U. S. 361.
*Michigan* v. *Flint, etc., R. R. Co.*, 152 U. S. 363.
*Walter A. Wood Co.* v. *Skinner*, 139 U. S. 293.
*Johnson* v. *Risk*, 137 U. S. 300.
*McManus* v. *O'Sullivan*, 91 U. S. 578.
*Marrow* v. *Brinkley*, 129 U. S. 178.

In *Adams County* v. *B. & M. R. R. Co.* 112 U. S. 123, the County had asserted title to certain realty under the Swamp Land Act of 1850. The defendant company denied plaintiff's title, and by way of cross-bill set up facts to show that the plaintiff was by its conduct estopped from asserting any title, and asked for affirmative relief. The case went for defendant in the

State Court, being their disposed of on the defense made by the defendant. The Supreme Court, by Chief Justice Waite, said:

" This brings us to the inquiry whether it appears sufficiently " that the case was disposed of below on this defense. If it " does, the motion to dismiss must be granted, and, having no " jurisdiction, we cannot pass on the correctness of that de- " cision.

" The record discloses that this separate and distinct defense " was made, and that it in no way depended on the validity or " invalidity of the original title of the county. In our opinion " it is clearly to be inferred from the decree of the Court of " original jurisdiction, which was affirmed in the Supreme " Court, that the decision in favor of the company was placed " entirely on that ground. So far as the original bill of the " county is concerned, the decree finds in favor of the company " and dismisses the bill. Then, as to the cross-bill, it finds the " legal title to be in the company, and that the county is " estopped from claiming the lands, or denying the company's " title thereto. This, of itself, implies that there was, in fact, " no decision against any right, title, privilege, or immunity " claimed under the Constitution or laws of the United States, " and that the decree rested alone on the defense of estoppel, " which was broad enough to control the rights of the parties " without disposing of the Federal question which it was at- " tempted to raise. In other words, it was adjudged by the State " Court that the title of the company must prevail in this suit, " because the county was precluded by its conduct from in- " sisting to the contrary. But, if we look to the opinions, " which, under the laws of Iowa, must be filed before a judg- " ment is rendered, and which, when such is the law, may cer- " tainly be looked at to aid in construing doubtful expressions in " a decree, it is shown unmistakably that the decision was put " on that ground alone.

" In the petition which was presented to the Chief Justice of " the Court for the allowance of a writ of error, it was stated " 'that in the pleadings, record, and judgment and decree there " 'were drawn in question' the rights of the county under the " swamp-land acts, as well as the construction of the land-grant " acts, and that the judgment was against these rights. The " Chief Justice, in his allowance of the writ, certified that he " found the statements in the petition to be true, but, if " this certificate is to have any effect at all upon this question, it " certainly cannot be taken as conclusive when the same Chief " Justice in an opinion on file in the case places the decision " entirely on the ground of estoppel.

" It follows that we have no jurisdiction."

In *Boggs* v. *Mining Co.*, 3 Wall. 304, a contest had arisen over the possession of certain mineral lands in California. It seems that the company had pleaded and proved in the California courts prior possession of the ground according to the usages and regulations of the mining district in which it was situated for the purpose of extracting gold therefrom. It was argued that the company, having the prior possession, ought to maintain the same, as the United States had impliedly allowed persons to take possession of and work mineral lands of the Pacific Coast, though such persons had no patent from the Government. The company was defeated in the California Courts, and obtained a writ of error. The United States Supreme Court held that no question was raised by the pleadings of which it had jurisdiction, and the writ was dismissed. The Court here held that there was no decision of the California Court against the validity of the alleged license from the Government to the company, the decision in California having been that no such license existed.

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*Even if it be held that a Federal question was raised in the State Court, yet the decision of that Court was upon another and entirely independent ground.*

The validity of Section 2336 of the Revised Statutes was expressly conceded by the State Court. The facts contemplated by that statute were, however, found not to exist in this case, and the judgment rested, as most clearly appears upon the face of the decision, upon a basis entirely distinct and independent.

Although a Federal question may have been raised in a State Court, yet, if the State Court proceeded upon another distinct ground not involving any Federal question, and sufficient in itself to maintain the judgment without reference to that question, the Supreme Court will not entertain jurisdiction.

*Beaupre* v. *Noyes*, 138 U. S. 401.
*Henderson Bridge Co.* v. *Henderson City*, 141 U. S. 688.
*Hale* v. *Akers*, 132 U. S. 564.
*Jenkins* v. *Loewenthal*, 110 U. S. 222.
*Blount* v. *Walker*, 134 U. S. 607.

"The rule is settled that to give this Court jurisdiction of a " writ of error to a State Court it must appear affirmatively not " only that a Federal question was presented for decision by the " highest Court of the State having jurisdiction, but that its de- " cision was necessary to the determination of the cause, and

" that it was actually decided, or that the judgment as rendered " could not have been given without deciding it."

*Cook County* v. *C. & C. Canal Co.*, 138 U. S. 651.

"It is well settled that where the Supreme Court of a State " decides a Federal question in rendering a judgment, and also " decides against the plaintiff in error upon an independent " ground not involving a Federal question, and broad enough to " maintain the judgment, the writ of error will be dismissed " without considering the Federal question."

*Hammond* v. *Johnston*, 142 U. S. 78.

" In order to sustain the jurisdiction of this Court upon the " ground that a Federal question is presented, it should appear " either that such question was apparent in the record, and that " a decision was made thereon, or that, from the facts stated, " such question must have arisen, and been necessarily in- " volved in the case. If it appear either that the decision of " the State Court was made upon rules of general jurispru- " dence, or that the case was disposed of upon other grounds, " broad enough in themselves to sustain the judgment without " considering the Federal question, and that such question was " not necessarily involved, the jurisdiction of this Court will " not attach."

*New Orleans* v. *N. O. W. Wks.*, 142 U. S. 84.

"The rule is well settled that, even if a Federal question was " raised in the State Court, yet, if the case was decided on " grounds broad enough in themselves to sustain the judgment " without reference to the Federal question, this Court will not " entertain jurisdiction. The authorities in support of this rule " are too numerous for citation."

*Delaware Co.* v. *Reybold*, 142 U. S. 643.
*N. Y. & N. E. R. R. Co.* v. *Woodruff*, 153 U. S. 689.

" It is settled law that to give this Court jurisdiction of a writ " of error to a State Court, it must appear affirmatively not only " that a Federal question was presented for decision by the " State Court, but that its decision was necessary to the deter- " mination of the cause, and that it was actually decided ad- " versely to the party claiming a right under the Federal laws " or Constitution, or that the judgment as rendered could not " have been given without deciding it.

" It is likewise settled law that where the record discloses " that if a question has been raised and decided adversely to a "party claiming the benefit of a provision of the Constitution "or laws of the United States, another question, not Federal, "has been also raised and decided against such party, and the "decision of the latter question is sufficient, notwithstanding "the Federal question, to sustain the judgment, this Court will "not review the judgment."

*Eustis* vs. *Bolles*, 150 U. S. 366.

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*Even if a Federal question be raised in a State Court and decided erroneously, yet if there be any other matter or issue adjudged by the State Court sufficiently broad to maintain the judgment of that Court, the judgment will be affirmed without any inquiry into the soundness of the decision of the Federal question.*

*Murdock* vs. *City of Memphis*, 20 Wall. 634.
*New Orleans W. Wks.* vs. *La. Sugar Co.*, 125 U. S. 29.
*De Saussure* vs. *Gaillard*, 127 U. S. 233.

In their assignment of errors the plaintiffs have five subdivisions (Record, pp. 118–119). The first and third of these subdivisions amount to practically the same thing. They assert that the State Supreme Court erred in holding that the United States mining laws, and particularly Section 2336 of the Revised Statutes, were not applicable to the facts of this case to the solution of the controversy between the parties hereto.

The second assignment of error contains the entire essence of the claims of the plaintiffs in error. It asserts in substance that there were two mining claims, one of which was known as the Carrington mine and was located in 1854, and the other of which was known as the Pine Tree mine, and was located in 1859 or 1860, several years after the location of the Carrington mine; that when Gillis became the owner of both of these claims he held them as separate and distinct claims until 1886, at which time he sold and conveyed, by deed of grant, bargain, and sale, the Pine Tree mine to the defendant in error, A. W. Stinchfield; that the gold in controversy was taken out of the intersection of two veins, one of which apexed in the Pine Tree ground, and one of which apexed in the Carrington ground; that the intersection and place from which the gold was taken, however, was in the Pine Tree ground, which had been conveyed by Gillis to Stinchfield.

The State Supreme Court did not assert or decide that the gold taken out of this part of the ground, which had been conveyed by Gillis to Stinchfield, would not have belonged to the owner of the Carrington ground, except that the owner of that same Carrington claim had, for a good and valuable consideration, conveyed that ground and place of intersection to Stinchfield, and that in making such conveyance Gillis had conveyed all of his rights to all of the gold in that intersection to Stinchfield. Gillis was the undoubted owner of all of the ground that was covered by the Carrington claim (which at one time, as the Court decided, included both the claims that were afterwards distinguished and known as the Carrington claim and as the Pine Tree claim), and while so the owner of all said ground he (Gillis) sold and conveyed to Stinchfield the ground out of which the gold in dispute was taken.

There can be no doubt but that Gillis, being the sole owner of all the ground, had the right to sell and convey such portions or parts thereof as he chose to so sell and convey. If he had been the owner of only that portion which is now known as the Carrington mine, and if the mineral lodes which apexed therein had inclined so as to pass into the ground now known as the Pine Tree claim, Gillis was not prohibited by Section 2336 of the Revised Statutes, or by any other law of Congress, or by any law, State or National, from still selling and conveying to Stinchfield or any one else so much of the lodes which apexed in the Carrington claim as inclined and extended into the Pine Tree ground. Whatever were the rights that the United States laws gave to Gillis to the veins which extended from his ground into other ground, those rights were the subject of sale and conveyance by him to Stinchfield. That Gillis did have property rights in the Pine Tree claim was conceded. This was and is conceded by the very fact that Stinchfield was willing to purchase, and did purchase, those rights. The question is not so much as to what those rights were as it is as to whether Gillis conveyed those rights to Stinchfield. We claim now that it is immaterial whether Gillis obtained his rights of property in the Pine Tree claim under the laws of the United States or not. He had those rights, and those rights *extended to the entire ownership of the property.* However Gillis became the owner of the Pine Tree claim, he *did own it,* and he owned the whole of it. Every lode and vein in that Pine Tree claim Gillis was the full and undisputed owner of, and it makes no difference in this case whether he became such owner because such lodes and veins apexed and were wholly situated in the Pine Tree claim, or whether he became such absolute owner partly because one of those veins apexed in the Carrington claim, of which he was the owner. Gillis being the owner, and being conceded to be the owner, and the full owner, of the entire Pine Tree claim and of every particle of gold therein, no greater right or title could be fixed in him by the laws of Congress than that which the California Courts have conceded to him. The greatest extent to which the laws of Congress could possibly place the title of the Pine Tree veins and lodes in Gillis was to give him the entire, full, and undisputed title to those lodes and veins. This full and entire ownership of the full and exclusive title to every vein and lode, and every particle thereof, no matter where those lodes or veins apexed, was given to Gillis by the State Superior Court, and this same full and exclusive title was also conceded to Gillis by the State Supreme Court. Not only is this true, but it is also true that such *full and entire title was conceded to have accrued to Gillis under and through the operation of the said United States laws.* Nothing of those laws was denied to Gillis. They had given to him the entire title to the property, and they could do no more. It was not disputed that the United States had passed the right of possession of the Pine Tree mine and all of the precious metals therein to Mr. Gillis. All that he could get from the United States under a location by himself or by any other person was conceded to him in the California Courts. The real question decided by the State Supreme Court was not how or by what chain of title Gillis became the owner of the Pine Tree claim and the precious metals therein, because both sides had asserted and conceded that he was such owner. Gillis's title to the Pine Tree mine and the precious metals therein was not an issue in the case. Instead of this, such ownership, up to the time that Gillis conveyed it to Stinchfield, was a conceded and undisputed fact. The disputed question was as to whether or not Mr. Gillis, by his own deed, had conveyed the full ownership of the Pine Tree mine and all the precious metals therein to Mr. Stinchfield. The issue decided in the case, and the entire issue as to title, turned upon the conveyance which Gillis had made to Stinchfield. If Gillis's deed to Stinchfield conveyed to Stinchfield the precious metals which were in the ground conveyed to Stinchfield, even though the vein from which those precious metals were taken apexed in the ground reserved by Gillis, then Stinchfield became the owner of those precious metals. If, on the other hand, the deed from Gillis to Stinchfield did not convey to the latter the precious metals which were found in the ground conveyed to him, then such precious metals remained the property of Gillis, and he could authorize Rice and Voss to take them. The entire question upon title turned upon the construction to be given to the deed of Gillis to Stinchfield, and this construction did not depend upon any law of Congress, but it depended *entirely* upon the laws of California.

Gillis did not execute his deed under the United States laws, but he executed it under the laws of the State of California. The laws of California provide for a special meaning to be given to the word "grant" in a deed of conveyance, and this word was used in the deed. The deed was executed under and according to the laws of California; it was acknowledged under the laws of California; it was recorded in the Recorder's office of the County of Tuolumne under the provisions of the laws of California; it was a conveyance of the title of Gillis, who was a citizen of California, to Stinchfield, who was also a citizen of California, and the conveyance was of the entire title of Gillis to real estate which was situated within the State of California.

Unless there is some United States law which prohibited Gillis from conveying his property rights in the Pine Tree claim to a purchaser, there was no Federal question decided in this case, and there is now no Federal question to be reviewed by the United States Supreme Court.

The only question to be decided is this: Did Gillis by his deed of conveyance, made in 1886, convey to Stinchfield the precious metals in the Pine Tree claim? If he did, then Stinchfield became the owner of such precious metals. If Gillis did not by that deed convey to Stinchfield the precious metals which were in the Pine Tree claim, then Gillis remained the owner of those precious metals. This is not a question that arises under any law of the United States, and it is not a question, we respectfully submit, which this august tribunal has any jurisdiction to decide.

The fifth subdivision of plaintiffs' assignment of errors is the only one which touches the merits of the controversy in this Court. That subdivision is to the effect that the Supreme Court of the State of California erred in deciding that Stinchfield was entitled to all of the mineral in the Pine Tree mine "*by reason of his deed*" from Gillis, and it asserts that under the statutes of the United States Gillis was entitled to follow the veins from the Carrington mine into and through the Pine Tree mine. There is, however, no law of the United States that allows a mine owner to follow a vein and take the mineral from it *after such mine owner has sold and conveyed that vein*, or the portion of it into which he follows, to another party; and this is as far as the decision of the Supreme Court of California goes.

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*To give this Court jurisdiction, not only must a Federal question have been raised and determined in the State Court, but it must af-*

*firmatively appear that the decision of the Federal question was necessary to the determination of the case, and that the judgment of the State Court could not have been given without deciding it.*

No Federal question was presented in the record on appeal to the Supreme Court below, by exception, objection, or assignment of error in any form. No decision of any Federal question was necessary to the determination of the case presented to that Court. The affirmation by that Court of the judgment of the trial Court did not require the mention of a Federal treaty, statute, law, or custom, because no Federal treaty, statute, law, or custom was invoked in the record. The judgment of the trial Court, as presented by the record carried to the State Supreme Court, would have been fully sustained by the application of the doctrine of estoppel which was made by the latter Court, even if Section 2336 of the Revised Statutes had not been mentioned in its opinion.

" From the beginning, it has been held that to give us jurisdiction in this class of cases, it must appear affirmatively on " the face of the record, not only that a Federal question was " raised and presented to the highest Court of the State for de- " cision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case.

*Choteau* v. *Gibson*, 111 U. S. 200.

" It is well settled, by a long series of adjudications, that to " give this Court jurisdiction by writ of error, to a State Court, " it must appear affirmatively, not only that a Federal question " was presented for decision to the highest Court of the State " having jurisdiction, but that its decision was necessary to the " determination of the case, and that it was actually decided, or " that the judgment as rendered could not have been given without deciding it."

*Walter A. Wood Co.* v. *Skinner*, 139 U. S. 295.

" We are not required to re-examine the judgment of a State " Court, simply because a Federal question may have been decided. To give us jurisdiction it must appear that such a " question was necessarily involved in the decision."

*Moore* v. *Mississippi*, 21 Wall. 638.
*Citizens's Bank* v. *Board of Liquidation*, 98 U. S. 141.

*If any Federal question was involved in the judgment of the State Court, the decision of that Court was clearly correct.*

There is no question in the case between contending locators. There is no contention between an earlier and a later location. When the deed to Stinchfield was executed in 1886, the entire ground out of which Gillis sold a portion and retained a portion constituted one mining claim, as he represented it to Stinchfield, or else, if it consisted of two claims, Gillis did not own, and never had owned, the ground he sold to Stinchfield (although estopped by his deed to Stinchfield from denying his own title). If the former be true, there certainly could have been no such thing as the "earlier location" contemplated by Section 2336. If the latter were true, then, giving to Gillis all he ever got by his deed from Carrington, *i. e.*, the "Carrington" as he now holds it, then what did he convey to Stinchfield by the deed of January, 1886? He must have conveyed or thought he was conveying something; and if he did not own the surface of the ground described in his deed to Stinchfield he must have meant to convey, or he must be held by his deed to have meant to convey, all under the surface of the ground to which he had any right as owner of the adjoining ground. That is, if he owned the Rice vein, which on its dip entered into the ground described in his deed to Stinchfield, then he sold so much of his Rice vein as lay within that ground. If he knew that he did not own the surface of the ground which his deed to Stinchfield purported to convey, then all that he thought he had to sell was so much of his vein or veins as lay beneath that surface.

If, on the other hand, owing to the peculiar nature of mining land tenure, and notwithstanding his unqualified grant to Stinchfield, Gillis did retain any right whatever in or to the premises which he sold, that right could not have been anything greater than a *right of way* through those premises down any vein which, apexing within his reserved ground, might be found to make its way into the demised ground. If he had any such right, notwithstanding his unconditional deed, it was not denied to him, but was secured to him by the decision of the trial Court (Record, p. 16). This was pursuant to the decision of the State Supreme Court on the first appeal:

"The deed of Gillis passed to the plaintiff the Pine Tree mine " to the same extent and to the same effect that a patent from " the United States would have passed it; that is, as against the " grantor, he was vested with the title to this mining claim, including every vein and every part of every vein throughout " its depth, which had its apex within the surface boundaries "of the claim, subject to the provisions of the Revised Statutes "of the United States heretofore quoted." (96 Cal. 37.)

The right of Gillis, if he had any, to intrude into the premises of his grantee could not be greater than the right of the government to intrude into the possession of its patentee.

A mineral patent, *as against the Government*, passes the mining claim described, including every vein and every part of every vein throughout its depth *which has its apex within the surface boundaries of the claim.* The only thing within the claim which remains *in the Government is the right of way* down veins which may apex on other ground belonging to it and dip into the claim conveyed, because its patent does not purport to pass veins which do not apex within the claim conveyed. We are not now speaking of the respective rights of two patentees or locators under the Government, but of the respective rights of the Government and its patentee. As between the latter, the patent passes from the Government to its grantee EVERY PART OF EVERY VEIN which has its apex within the claim conveyed. If the Government had owned the ground which Gillis owned when he executed to Stinchfield the deed of January 17, 1886, and had conveyed by a patent to Stinchfield that portion of the ground which Gillis conveyed by deed (that is, if the Government had been the owner of the ground including both the Rice vein and the West vein, and had granted to Stinchfield a patent for the ground including the West vein), it would have been forever estopped by its patent from asserting any right *in itself* in or to the patented premises, excepting a right of way down the Rice vein on its dip, which would have been reserved to it by the provisions of Section 2336, and by the reservation in the language of the patent itself. As to *any portion of the West vein*, the Government could assert no right of any kind thereto. No question as to the respective rights of the patentee and a prior locator to the space of intersection of cross-veins could arise *between the Government and its grantee.*

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A single reading of the opinion of the State Supreme court is sufficient to show beyond peradventure that judgment went against the plaintiffs in error upon a ground peculiarly within the domain of that court, and sufficiently broad to sustain the decision; and that no Federal question was decided, or sought to be decided; and that no error in the consideration of any Federal question is anywhere set up or claimed in the record, the petition for the writ not forming part of the record upon which action will be taken in this court.

*Butler* v. *Gage*, 138 U. S. 56.

The validity of Section 2336 of the Revised Statutes was not drawn in question in the State court. That court, being referred to the section in argument only, and not in any record matter requiring to be reviewed, simply held that the facts did not exist to bring the case within the statute. The estoppel which Gillis's deed and conduct had raised was *conclusive* against him. As in *Adams County* v. *R. R. Co.*, *supra*, the case did not go back of the estoppel, but was disposed of on that ground.

As was said by Chief Justice Waite, in *Crary* v. *Devlin* 154 U. S. 619:

"There could have been no decision of the Court of Appeals "against the validity of any statute of the United States, be-"cause it was found that the facts upon which the defendants "below relied to bring their case within the statute in question "did not exist. The judgment did not deny the validity of the "statute, but the existence of the facts necessary to bring the "case within its operation."

It was held in *Cook County* v. *C. & C. Canal Co.*, 138 U. S. 653, that "the validity of a statute is not drawn in question every "time rights claimed under such statute are controverted, nor is "the validity of an authority every time an act done by such "authority is disputed."

In the clear light of the numerous decisions of this Court, it is difficult to perceive why the writ should have been taken, unless it was for delay, or why any further argument can be necessary.

The question on which jurisdiction depends is so frivolous that the case seems to us to be a proper one for the application of the rule in respect to motions to affirm.

*Hinckley* v. *Morton*, 103 U. S. 764.
*Micas* v. *Williams*, 104 U. S. 556.
The "S. C. Tryon," 105 U. S. 270.
*Chanute City* vs. *Trader*, 132 U. S. 211.

We think that the writ of error ought to be dismissed under the numerous precedents hereinbefore cited. If not, the judgment of the Supreme Court of California should be affirmed.

Respectfully submitted.

M. A. WHEATON,
I. M. KALLOCH,
F. J. KIERCE,
For Defendant in Error.

# APPENDIX.

(Following is the decision of the Supreme Court of California on the first appeal, as the same is reported in Vol. 96 of the California Reports, at page 33):

(No. 14,752. Department One. August 25, 1892).

A. W. Stinchfield, Appellant, v. James N. Gillis et al., Respondents.

Appeal from a judgment of the Superior Court of Tuolumne County, and from an order denying a new trial.

The main facts are stated in the opinion of the Court. The bulkhead spoken of in the last clause of the opinion was erected in the works as an agreed boundary after the defendant, Rice, had excavated the vein at the point of intersection, and after the drifts in the two mines had come together.

Garoutte, J.—This action was brought to recover the value of certain gold alleged to have been taken by respondents from the mining claim of appellant. The facts, briefly stated, are as follows: For many years prior to January 17, 1886, respondent, Gillis, was in the peaceable possession of, and claiming to be the owner of, a certain mining claim known as the Carrington claim. Upon said date he sold and transferred to appellant, by bargain and sale deed, a portion of the Carrington claim designated as the Pine Tree mine. At the date of this transfer the co-respondent, Rice, was working upon a portion of the Carrington claim not included in the transfer to Stinchfield, known as the Rice vein, giving Gillis a certain percentage of all gold taken out for the use of the mine. The apices of a vein called the West vein and of the Pine Tree vein were within the surface limits of the Pine Tree mine, and the apex of the Rice vein was in that portion of the mine not transferred to Stinchfield by Gillis. Immediately after the transfer to Stinchfield, Gillis located or relocated that portion of the mine not transferred, and within a few days thereafter Stinchfield located that portion of the mine transferred to him. The Rice vein and the West vein, in their descent into the earth, intersect within the surface ground purchased by Stinchfield, and at the point of intersection of these veins valuable deposits of gold were found. Rice, in following his vein into the earth, came to the point of intersection, and thereupon found the deposits of gold, which he removed as his property; a few days subsequent, Stinchfield, following the West vein into the earth, arrived at the same spot, but too late; indications pointed unmistakably to what had been, but the gold was gone. Appellant claimed the gold to be his property, and brought this action to recover ten thousand dollars, the same being the value thereof. Judgment went against him, and this appeal is before us, attacking the judgment and the order denying the motion for a new trial.

As between the owners of separate and intersecting veins, the ownership of the mineral contained within the space of intersection is determined according to the provisions of Section 2336 of the Revised Statutes of the United States, which reads as follows: "Where two or more veins intersect or cross each "other, priority of title shall govern, and such prior location "shall be entitled to all ore or mineral contained within the "space of intersection; but the subsequent location shall have "the right of way through the space of intersection for the "purpose of the convenient working of the mine; and where "two or more veins unite, the oldest or prior location shall "take the vein below the point of union, including all the "space of intersection."

From an examination of the record, it is apparent that the judgment for respondents was based upon the law quoted, taken in connection with the finding that neither Gillis nor his grantor, Carrington, ever located the Carrington claim, and the further fact that the location of Gillis, made after his deed to Stinchfield, was prior in point of time as compared to the location of Stinchfield. This is necessarily the fact, for the Court finds in express terms that the gold was taken from the point of intersection of the veins to which reference has already been made, and that such point of intersection was upon the Pine Tree mine. Under such conditions the title to the gold would be determined by priority of title to the respective mines, and it is from this standpoint that the Court decided the case. As between the plaintiff and Gillis, the locations of their respective mines, made subsequent to the deed of Gillis, are not material to any matter involved in this litigation. By bargain and sale deed Gillis conveyed the Pine Tree mine to plaintiff, particularly designating its surface boundaries. These parties occupied the relative positions of grantor and grantee, under a bargain and sale deed, with all the rights and obligations peculiar to that relation, and it is elementary that Gillis, by a subsequent location or otherwise, could not obtain any title which he could assert against his grantee, and thereby defeat or limit his grantee's estate, or destroy or limit any easement or right appurtenant thereto, and necessary to the enjoyment of a perfect title. By his deed, respondent Gillis was estopped from denying his own title in fee at the date of that conveyance, and therefore necessarily estopped from denying a valid location by himself, or his grantor, as the basis of such title. If he had title to the mining claim at the date of the deed, he could only have had such title by virtue of a prior location, for title in fee necessarily implies a prior valid location. It was said in *Belcher Con. G. M. Co.* v. *Deferrari*, 62 Cal. 163: "As we take notice of "the character of the property and its original ownership in the "United States, the defendants were estopped from denying "that they and their co-grantors (or those from whom they de- "rived) had located the mines in accordance with the laws of "the United States—the only way in which the title could be "acquired." It follows that no right whatever accrued to the grantor Gillis as against his grantee, the plaintiff, by virtue of his subsequent location, and that the location of the Pine Tree mine, as against the grantor Gillis, must have occurred at some time prior to his deed to Stinchfield. In *Champion Mining Co.* v. *Gold Mining Co.*, 75 Cal. 78, it was held that defendant's location must be considered as having been made at least from the date of its patent, and here it must be considered that the location of plaintiff's mine must have been made at least as early as the date of his deed.

The deed of Gillis passed to the plaintiff the Pine Tree mine to the same extent and to the same effect that a patent from the United States would have passed it; that is, as against the grantor, he was vested with the title to this mining claim, including every vein, and every part of every vein throughout its depth which had its apex within the surface boundaries of the claim, subject to the provisions of the Revised Statutes of the United States heretofore quoted.

It is insisted that the West vein is not a vein, but a crossing. The Court finds this "crossing" to be a "single small vein dip- "ping to the west, and having its apex in the Pine Tree mine." If this crossing, as it is termed, is a vein, and the Court has so found it to be, its size is immaterial when considered with reference to the legal rights attached to the ownership. A "single small vein" is weighed and measured by the same law, and entitled to the same consideration before the Court, as the mother lode, and very often is far more valuable in the eyes of its owner. In the case of *Jupiter Mining Co.* v. *Bodie Mining Co.*, 11 Fed. Rep. 675, Circuit Judge Sawyer said: "A vein or lode "authorized to be located is a seam or fissure in the earth's

" crust filled with quartz, or with some other kind of rock in
" place, carrying gold, silver, or other valuable mineral deposits
" named in the statute. It is not enough to discover detached
" pieces of quartz or mere bunches of quartz not in place. The
" vein, however, may be thin, and it may be many feet thick
" or thin in places, almost or quite pinched out, in miner's
" phrase, and in other places widening out into extensive bodies
" of ore. So, also, in places it may be quite or nearly barren,
" and at other places immensely rich. It is only necessary to
" discover a genuine mineral vein or lode, whether small or
" large, rich or poor, at the point of discovery within the lines
" of the claim located, to entitle the miner to make a valid location, including the vein or lode."

By reason of the views of the Court hereinbefore expressed, the finding that neither Gillis nor his grantor made a location of the Carrington claim prior to the deed to Stinchfield is immaterial, and, if material, the evidence disclosed by the record is too weak to support it. The facts as to the erection of a barricade or bulkhead by the parties between the works of the respective mines are immaterial to the questions here involved, conceding them to be as claimed by respondent. (*Stockton* vs. *Garfrias*, 12 Cal. 315.)

Let the judgment and order be reversed, and the cause remanded for a new trial.

HARRISON, J., and PATERSON, J., concurred.

Hearing in Bank denied.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

661.

# In the Supreme Court of the United States.

October Term, 1895.

J. N. GILLIS ET AL., PLAINTIFFS IN ERROR,

VS.

A. W. STINCHFIELD, DEFENDANT IN ERROR.

# BRIEF OF PLAINTIFFS IN ERROR ON MOTION TO DISMISS WRIT OF ERROR

J. C. CAMPBELL,
F. W. STREET,
J. F. ROONEY,
For Plaintiffs in Error.

# IN THE SUPREME COURT
OF THE
# UNITED STATES.

J. N. GILLIS, JOHN T. FAXON, ADMINISTRATOR OF THE ESTATE OF F. B. RICE, DECEASED, AND J. N. VOSS,

Plaintiffs in Error.

vs.

A. W. STINCHFIELD.

Defendant in Error.

## BRIEF OF PLAINTIFFS IN ERROR ON MOTION TO DISMISS WRIT OF ERROR AND TO AFFIRM JUDGMENT.

The defendant in error, in support of his motion to dismiss the writ of error issued to the Supreme Court of the State of California in said case, claims that the record presents no Federal question for review.

The first point asserts that, "Neither in the pleadings, nor in the proceedings during the trial, nor in the assignment of error, was any Federal question raised nor was any right or title of a Federal nature set up or claimed."

In reply to the foregoing proposition the plaintiffs in error contend that this Court has uniformly held that 25th section of the Judiciary Act, does not require that the Act of Congress under which the party claims, who brings the final judgment of a State Court into review before this Court, should have been pleaded specially, or spread upon the record.

Hickie vs. Starke, 1 Pet., 197.
Wilson vs. Marsh Co., 2 Pet., 245.
Armstrong vs. Treasurer, 16 Pet., 281.
Insurance Co. vs. Needles, 113, U. S. 574.

Canal Co. vs. Superior Court, 116, U. S., 410.

Kaukauma Water Power Co. vs. Greene Bay Co., 132. U. S., 254.

In Hickie vs. Starke, 1st Peters, 197, this Court, by Marshall Ch J, said: " In the construction of that " section, the Court has never required that the treaty " or Act of Congress, under which the party claims, " who brings the final judgment of a State Court into " review before this Court, should have been pleaded " specially or spread on the record But it has al" ways been deemed essential to the exercise of juris" diction in such a case, that the record should show a " complete title under the treaty or act of Congress, " and that the judgment of the Court is in violation of " that treaty or act."

In the case of Wilson vs. Blackbird Creek, Marsh Co., 2d Peters, 250. this Court say: "The precedents " establish, so far as precedents can establish anything, " that it is not necessary to state in terms on the record " that the Constitution or a law of the United States " was drawn in question It is sufficient to bring the " case within the 25th section of the Judiciary Act, if " the record shows that the Constitution, or a law or " treaty of the United States must have been miscon" strued, or the decision could not be made"

In Furman vs Nichol, 8th Wallace, 56, this Court decided: " It is urged that the particular provision of " the Constitution, which the plaintiffs in error say " has been violated in its application to their case, " should be contained in the pleadings, but this is in " no case necessary. If the record shows, either by " express averment, or by clear and necessary intend" ment, that the constitutional provision did arise, and " that the Court below could not have reached the con" clusion and judgment it did reach without applying " it to the case in hand, then the jurisdiction of this " Court attaches."

In Kaukauna W. P. Co. vs. Green Bay Co., 142, U. S., 254, the Court says: "This Court has had frequent "occasion to hold that it is not always necessary that "the Federal question should affirmatively appear on "the record, or in the opinion, if an adjudication of "such question was necessarily involved in the disposition of the case by the State Court."

## THE RECORD SHOWS THAT A FEDERAL QUESTION WAS PRESENT IN THE CASE, WAS CONSIDERED BY BOTH THE SUPERIOR COURT AND SUPREME COURT AND WAS DECIDED ADVERSELY TO THE PLAINTIFFS IN ERROR.

The record shows that the controversy in this case was concerning the ownership to the ore and gold contained within the space of intersection of two veins or lodes apexing upon different mining claims, situated upon and being portions of the mineral land of the Public Domain of the United States. The record shows that the Carrington mine was owned by Gillis, was located prior to the Pine Tree Mine, and was a separate and distinct mining claim, from the time of its location in the Spring of 1854 down to the commencement of this action.

The record shows that the Pine Tree Mine was located subsequently to the Carrington Mine, was held as a separate and distinct claim, down to the commencement of this action.

The questions raised by plaintiffs in error in the State Courts, were, that Gillis had conveyed to Stinchfield the Pine Tree Mine, a separate and distinct claim from the Carrington Mine. That Gillis had the right to follow the Rice Vein, which had its apex upon the Carrington Mine upon its dip, beneath the surface of the Pine Tree mine, and appropriate to his own use the gold found in the Rice Vein at the point of its intersection with the West Vein, which had its apex on the Pine Tree Mine, because the Carrington Mine was the older or prior location.

Now, these facts raised a Federal question in the case, and presented an issue which could only be determined by an application of Sections 2322, 2336 of the Revised Statutes of the United States.

The only object in establishing those facts was to bring the case within these provisions of law, and the record shows that this was the only object by clear and necessary intendments. The plaintiffs in error contended throughout that this was the only issue in the case.

The Superior Court in its conclusions of law considered that there was a Federal question presented for decision and decided that section 2336 of the Revised Statutes of the United States determined this controversy, (folio 34), and the Supreme Court of California, in its decision, considered that a Federal question was presented by the record in this case, discussed the provisions of Section 2336 in connection with the facts of the case and decided the same adversely to the plaintiffs in error. Folios 274, 275 and 276 of Transcript

The record also shows (folio 255) that the plaintiffs in error assigned as error of law: " That said decision " is against law 1st. The findings do not support the " judgment. 2d. That plaintiff is not entitled as ap- " pears from the facts found by the Court, to a judgment " against the defendants for $10,000 and costs, or to a " judgment for any sum whatsoever. 3d. That upon " the facts found by the Court, the defendants were " entitled to a judgment for the costs. "

This was a sufficient assignment of error in order to call the Court's attention to the statutes applicable to the facts of the case without setting them out in full in the record, because all Courts take notice without pleading, of the Constitution of the United States, and the public laws of the United States, and the State where they are exercising their functions.

Code of Civil Procedure (California) Section 1875.
Farmon vs. Nichol, 8th Wallace, 57.)

THE FEDERAL QUESTION PRESENTED BY THE RECORD IN THIS CASE WAS DECIDED BY THE SUPREME COURT AGAINST THE PLAINTIFFS IN ERROR.

The construction by the Supreme Court of the deed from Gillis to Stinchfield, by which he conveyed the Pine Tree Mine to the latter, was practically and in effect a decision against the rights claimed under Section 2322 and 2336 of the Revised Statutes of the United States, by the plaintiffs in error to the gold and ore contained within the space of intersection of the veins and lodes, one of which apexed upon the Carrington Mine, owned by Gillis, and the other, apexing upon the Pine Tree Mine, owned by Stinchfield

In Roby vs. Coleham, 146, U. S., 776, the Court says: "But although it does not appear from the opinion of the Court of original jurisdiction or the opinion of the Supreme Court of Illinois that either Court formally passed upon any question of a federal nature, the necessary effect of the decree was to determine adversely to Roby the rights and immunities claimed by him in the pleadings and proofs under the proceedings in bankruptcy, to which reference has been made."

The Court in that case, futher says: "In view of the certificate by the Chief Justice of the State Court the office of which, as said in Parmelee vs. Lawrence, 11 Wallace 36, 38, was, as respects the federal question, 'to make more certain and specific what is too general and indefinite in the record,' we are not disposed to construe the pleadings so strictly as to hold that they did not sufficiently set up and claim the federal rights which that certificate states were claimed by Roby but were withheld and were intended to be withheld from him by the Court."

The motion to dismiss was accordingly overruled.

A federal question having been raised and having been decided against the plaintiffs in error, the jurisdiction of this Court has attached, and it must be heard in its merits.

Railroad Company vs Maryland, 20, Wallace 645. In this case the Court of Appeals of Maryland decided the case on two grounds One of the grounds was that the act of the Maryland Legislature was not in conflict with the Constitution of the United States. The other ground was, that the railroad Company having acted as the agent of the State to collect money from passengers, could not in this action avail itself of the illegality of their act in demanding and receiving it.

It was claimed in the argument in support of a motion to dismiss the writ of error, that the second ground above mentioned as one on which the Court of Appeals placed its judgment was of itself sufficient to control the case.

This Court by Justice Miller said: "Some of the " decisions of this Court under the Act of 1789 would " undoubtedly justify this view taken by the counsel of " the defendant in error, in support of the motion to " dismiss, if it were clear that the second proposition " on which the Court of Appeals placed its judgment " was sufficient to control the case, and that it in- " volved no consideration of Federal law. But the " Act of 1889 contained restrictive language not in the " Act of 1867; and in construing the statute as it now " stands, we have ruled in the case of Murdock vs. " Memphis, just decided, that where the Federal ques- " tion has been raised, and has been decided against " the plaintiff in error, the jurisdiction has attached, " and it must be heard on its merits."

## THE DECISION OF THE COURT, WHILE IT IS BASED UPON THE CLAIMED ESTOPPEL BY DEED, YET THE FEDERAL QUESTION WAS SO INVOLVED IN THE DETERMINATION OF THE CASE, THAT THE CONCLUSION ARRIVED AT COULD NOT BE REACHED WITHOUT AN ADJUDICATION OF THE FEDERAL QUESTION.

While the rule of this Court appears to be settled, that if the case was decided in the State Court on grounds not involving a Federal question, but broad enough to sustain the decision, this Court will refuse to entertain jurisdiction; yet, by a perusal of the decision of the State Court in this case, it will clearly appear, that the Federal question *was* involved in that decision, and the local question was not sufficient in itself to maintain the judgment without reference to the Federal question and without the decision thereof against the title and rights claimed by plaintiffs in error.

The decision of the State Court rests upon the conclusion, (erroneously, Gillis claims,) by it drawn from the Findings of Fact that, "The mining ground held by Carrington, to which Gillis took possession under his deed of June, 1872, must be considered as a single claim, irrespective of the original locations of different parts of the claim." (Decision State Court, Record folio 273.)

Without this conclusion, as the basis of the decision, the State Court could not have held, that Gillis, by reason of his deed to Stinchfield, was estopped from asserting a right to the gold found at the intersection of the Rice and West veins. The State Court finds that the Carrington Mine, reserved by Gillis, and the Pine Tree Mine, by him conveyed to Stinchfield, were two separate and distinct locations. They do not find that these locations were ever consolidated into a single claim by any act on the part of Gillis or his grantor in compliance with mining customs or with the mining laws of the United States. By complying with the mining laws of the United States, a person can enter upon public mineral lands and acquire a mining claim. If such person, at different times, locates two adjoining claims, there is but one method under the mining laws of the United States, by which these claims can be united into a single claim, (and there is no law of the State of California in regard to the location of mining claims, by which such claims can be united into a single claim,) and that is by a re-location, and such claim can not exceed the dimensions prescribed by Section 2320 of the Revised Statutes.

Whether or not the State Court erred in holding that the Carrington and Pine Tree Mines must be considered as a single claim, is one of the many Federal questions to be considered and determined by this Court. Should this Court hold the State Court in error upon this point, the question then to be determined is, has Gillis the right to the gold taken by him at the intersection of the Rice and West Veins, by virtue of the provisions of Section 2336 of the Revised Statutes.

Counsel in their brief assert, that "The entire question upon title turned upon the construction to be "given to the deed of Gillis to Stinchfield, and this "construdtion did not depend upon any law of Con"gress, but it depended *entirely* upon the laws of Cali"fornia"

Note the decision of the State Court and see the error contained in this assertion If the construction of the deed depended *entirely* on the laws of California, why is it, that the State Court recognized the right of Gillis, under section 2322 of the Revised Statutes, to follow the Rice vein, apexing on the ground reserved, on its dip beneath the surface of the ground conveyed to Stinchfield? The State Court in its opinion says, "we concede that when mining ground is conveyed by "deed without express limitation the granter takes "subject to the characteristics of mining property given "to it by prevailing customs and laws, and not with "the absolute dominion which flows from a convey"ance in fee of ordinary land. The mining thus "granted is still subject to all mining laws and customs "which are applicable." (Record page 123.) The Court then says, "but the provisions of Sec. 2336, that when "two veins intersect 'priority of title shall govern, and "such prior location shall be entitled to all ore or "mineral contained within the space of intersection' "cannot possibly be applied to the case where A con"veys part of his mining claim to B, for in such a case "there is no prior location. Therefore in such a case "the ordinary rules which govern grants of land must "of necessity apply, and if the intersection takes place "on the claim conveyed, the grantee takes all the "mineral within the space of intersection."

While the State Court does not decide the question, whether Stinchfield would have been entitled to follow the West vein into the ground retained by Gillis and to claim the gold contained therein, or whether Gillis would have been entitled to any of the gold that might be found in the Rice vein within the ground conveyed to Stinchfield, yet it is conceded that Gillis had the right to follow the Rice vein on its dips beneath the surface of the mining ground conveyed by him to Stinchfield The Superior Court, in its conclusions of law, held that Stinchfield was the owner of every vein which had its apex within the surface boundaries of the Pine Tree Mine, subject to the provisions of Sec. 2336 of the Revised Statutes (Record folio 34.) It being conceded that Gillis had the right to follow the Rice vein beneath the surface of the ground conveyed by him to Stinchfield, it follows as a logical conclusion that he owned that vein underlying the surface of the ground which he had conveyed Such ownership was not in Gillis by reason of any law of the State of California. A grant construed solely under the State law, without any reservations, would give the grantee the right to any and all veins within the granted premises wherever their apices might be. The only law which gave Gillis the right to and the ownership in the Rice vein is section 2322 of the Revised Statutes of the United States. Gillis being the owner of the Rice vein, where does such ownership cease? The State Court says, "The gold in controversy was found within the limits of the two walls forming the West vein, although the place at which it was found is also *within the lines of the walls which form the Rice vein.*" (Record page 123.) The two veins intersect. They form one common mass. Gillis, the Courts concede, is the owner of the Rice vein to this intersection, but by the decision of the Court he has no right in common with Stinchfield in the commingled veins The Federal question is there involved. Gillis is denied the right to a joint interest in the vein matter formed by the intersection, viewing the case in the light of the decision of the State Court, and that the Pine Tree Mine must be considered as a part of a single claim.

The *validity* of the mining laws of the United States was not drawn in question in this case, but the *rights* claimed by Gillis under those laws, has been denied him.

The decision of the Supreme Court of California on the first appeal in this case, forms no part of the record, and upon this motion, that decision, we submit, is not in question before this Court.

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## IT APPEARS THAT A FEDERAL QUESTION WAS INVOLVED IN THE JUDGMENT OF THE STATE COURT, AND THAT THE DECISION OF THAT COURT WAS ERRONEOUS.

This involves a discussion upon the merits of the case, and for such discussion the Court is referred to the Brief of Plaintiffs in error, heretofore filed in this Court.

In the case of Sayward vs. Denny, 158, U. S. 186, the Court enumerates seven principles that must govern and by which a cause will be tested, to determine whether or not the United States' Supreme Court has jurisdiction. The 6th and 7th of those principles are: "The right on which the party relies must have been " called to the attention of the Court, in some proper " way, and the decision of the Court must have been " against the right claimed. Or, at all events, it must " appear from the record, by clear and necessary in- " tendment, that the federal question was directly in- " volved, so that the State Court could not have given " judgment without deciding it; that is, a definite issue " must be distinctly deducible from the record before " the State Court can be held to have disposed of such " federal question by its decision."

Tested by these principles, it is apparent, that this Court has jurisdiction over this case, and that the writ of error should not be dismissed and, we contend, that the cause should be considered by the Court upon its merits, and that the judgment of the Supreme Court of California should be reversed.

Respectfully submitted,

J. C. CAMPBELL,
F. W. STREET,
J. F. ROONEY,
For Plaintiffs in Error.

Office Supreme Court U. S.
FILED,
OCT 26 1895
JAMES H. McKENNEY,
*CLERK.*

# Plaintiffs in Error Brief

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**Supreme Court of the United States.**

**October Term, 1895.**

661.

J. N. GILLIS, JOHN T. FAXON, ADMINISTRATOR OF THE ESTATE OF F. B. RICE, DECEASED, AND J. N. VOSS, PLAINTIFFS IN ERROR,

vs.

A. W. STINCHFIELD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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**FILED, OCTOBER , 1895.**

**[15,951.]**

# In the Supreme Court of the United States,

J. N. GILLIS, J. N. VOSS and J. T. FAXON, Administrator of the Estate of F. B. RICE, deceased, Plaintiffs in error, VS. A. W. STINCHFIELD, Defendant in error.

This is an action instituted in the Superior Court of the County of Tuolumne and State of California by the defendant in error to recover judgment against the plaintiffs in error for the sum of ten thousand dollars the value of gold taken by them from a mining claim claimed by the defendant in error

The plaintiffs in error J. N. Gillis, answered the complaint by alleging ownership of the gold abovementioned, and the plaintiffs in error, to-wit: J T. Faxon, Administrator of the estate of F. B. Rice, deceased, and J. N. Voss, justified under and by virtue of a lease from Gillis, granting them the right and privilege to work and extract the ore containing the gold which is the subject matter of this controversy.

The Court below rendered judgment in favor of the defendant in error and against the plaintiffs in error for the sum of ten thousand dollars. From that judgment the plaintiffs in error appealed to the Supreme Court of the State of California, and that Court affirmed the judgment of the said Superior Court. The plaintiffs in error bring the case upon a writ of error to this Court, to reverse the judgment of the Supreme Court of the State of California rendered in said action.

## FACTS OF THE CASE.

The controversy in this case concerns two mining claims, situated at Jackass Hill, in Tuolumne county known as the Carrington Mine and the Pine Tree Mine both of which being portions of the mineral land of the public domain of the United States.

The Carrington Mine was located in the spring of

1854, by E. T. Carrington, Elizabeth G. Carrington, A. P. Carrington, F. G. Tyree, T. R. Tyree, and T. Brookshire who posted their notices on the Carrington vein, which notices contained the names of said parties and that they claimed one thousand feet on said Carrington vein by one hundred feet in width on each side thereof.

In the year 1856, the said E. T. Carrington acquired the interest of said parties in and to the said Carrington Mine and thereafter he continued to be owner of the entire mine and continued in the possession thereof until the month of June 1872.

In 1859, or 1860, the said E T. Carrington located the Pine Tree Mine by posting three notices on the Pine Tree vein, claiming three hundred feet in length along said vein He continued to be the owner thereof and continued in the possession thereof until the month of June 1872.

In June 1872, the said T. E. Carrington conveyed the Carrington mine to the said plaintiff in error J. N. Gillis. While the Carrington mine only was mentioned in the deed yet it was the intention of the parties that the Pine Tree Mine should also be conveyed by Carrington to Gillis.

Under the deed from T. E Carrington to Gillis he took possession of the Carrington Mine and the Pine Tree Mine and from that time he became the owner of said mines and continued to be the owner thereof and continued in the possession of said mines until the 17th day of January 1886, at which time he conveyed the Pine Tree Mine to the said A. W. Stinchfield the defendant in error. The property conveyed being described as follows: All that certain quartz claim, vein, lead or lode situate in the County of Tuolumne, State of California, and more particularly described as: Being situate on Jackass Hill about one mile from the town of Tuttletown and commencing at a monument of stone marking the southeast corner of the Atlas mine, thence running one hundred and seventy-one feet (171) in a northwesterly direction to a stake in a monument of stone, thence running in a southeasterly direction seven hundred and fifty feet (750) more or less to a stake in stone mound, thence easterly 171 feet to a tree blazed on two sides with stones around it, thence northwest seven hundred and fifty feet more or less to the place of beginning, being that certain quartz claim known as the Pine Tree Mine and bounded on the north and east by the Atlas and Wilson and Means mines on the west by the Carrington mine and on the south by the Chileno mine

On the Carrington claim as located in 1854 were three quartz veins, now known as the Carrington, Criss, and Rice veins. The course of these veins is northwest and southeast, and then dip into the earth is northeast. Each of these veins has its apex on and within the original Carrington location.

Within the Pine Tree Mine. conveyed by Gillis one of the plaintiffs in error to the Stinchfield the defendant in error, there are the following veins, the Ray, Pine Tree. Stocker and the West. The course of all these veins, except the West is northwest and southeast and dip to the northeast. The course of the West vein is north and south and its dip is to the west.

In the month of May 1885, the said Gillis, one of the said plaintiffs in error gave to F. B. Rice now deceased, a verbal license for five years to work and mine upon the Carrington mine for the consideration rent and royalty of one-fourth of the gross yield of the gold obtained by him from said mine.

In the latter part of May 1885 the said Rice entered into the possession of the Carrington mine and commenced to work thereon by means of an incline sunk on said Rice veins. On the 16th day of January 1886, he had sunk the said incline on the Rice vein to the depth of about thirty feet. On that date his windlass was on said incline and his mining tools were in said incline.

On the said last mentioned date, Gillis and Stinchfield measured off the ground which Gillis on the following day conveyed to Stinchfield. Their measurements included the ground that Rice was working under said license, and he thereupon objected and protested in the presence and hearing of Stinchfield to any measurements that would include the vein upon which he was working under said license and forbade them coming nearer to his incline than a certain oak tree which was twenty-six feet from the Rice vein.

Thereupon in recognition of the rights of Rice to the Rice vein Gillis and Stinchfield changed the boundary of the mine sold to Stinchfield so as not to include the Rice vein in the ground sold by Gillis to Stinchfield.

On the 7th day of December 1886, the said Rice entered into a partnership with the said J. N. Voss one of the plaintiffs in error, and they together continued to sink the Rice incline No 1, to a depth of about forty-eight feet from the surface, where the Rice vein on the foot of the incline intersected with the said West vein

They then drifted northerly and southerly along the intersection of the Rice vein and the West vein and it was along this line of intersection of these two veins at their junction, that Rice and Voss obtained the gold which is the subject of this litigation.

The plaintiffs in error contend that there is a Federal question involved in this controversy and that the ownership of the subject matter of this litigation should be determined in accordance with the provisions of the Mining Statutes of the United States By the provisions of section 704 Destys Federal Procedure, page 331, "it is provided that where any title, right, privilege or immunity is claimed under the Constitution or Statute of the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution or Statute or authority, may be examined and reversed, or affirmed in the Supreme Court upon writ of error.

The plaintiffs in error claim the right to the ore and gold in controversy in this action under the following provisions of the Statutes of the United States, entitled an act to promote the development of the mineral land of the Public Domain, passed May 10th, 1872. Sec. 2322, of the Revised Statutes of the United States provide as follows, "The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode or ledge, situated on the public domain—so long as they comply with the laws of the United States. and with State, Territorial and local regulations not in conflict with the laws of the United States, governing their possessory title—shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically. Although such veins, lodes or ledges, may so far depart from a perpendicular in their course downward as to extend outside the vertical side line of such surface location. But their right of possession to such outside veins, lodes or ledges, shall be confined to such portions thereof as lie between vertical plans drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges.

Sec. 2335, Where two or more veins intersect or cross each other, priority of title shall govern and such prior location shall be entitled to all ore or mineral contained within the space of intersection but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the older or prior location shall take the vein below the point of union including all the space of intersection.

The Superior Court held that Sec. 2336 of the Revised Statutes, of the United States, determined the ownership to the gold in controversy in this action (folio 34, page 16, of transcript.) And the Supreme Court of California decided that said section 2336, of the Revised Statutes of the United States, has no application to the facts of the case. Folio 274, page 122, of transcript.

## ERRORS IN LAW

1st. The Supreme Court of the State of California erred in adjudging that the mining laws of the United States, and especially section 2336, of the Revised Statute of the United States, were not applicable to the solution of the controversy between the plaintiffs and defendants, herein. Folio 263.

The ultimate facts found by the Court below, are as follows:

1st. That the Carrington mine was located in the spring of 1854, by T. E. Carrington, Mrs. E. Carrington and four other persons, claiming 1000 feet in length along the Carrington vein by 100 feet in width on each side from the center thereof Folio 22.

2d. That T. E Carrington succeeded to the entire ownership of said mine. Folio 22.

3d That he maintained the ownership and possession thereof until June 1872, when he sold the same to J. N. Gillis, one of the plaintiffs in error. Folio 23

4th. That Gillis has owned and possessed that mine ever since. Folio 24.

5th. That T. E. Carrington located the Pine Tree mine in the years 1859 or 1860, claiming three hundred feet in length along the vein and that he maintained the possession of and worked and occupied it until 1872. Folio 25

6th That the plaintiff in error, J. N. Gillis, took possession of the said Pine Tree Mine in the month of June 1872, and held and possessed it until he sold the same to the defendant in error January 17th, 1886. Folio 23.

7th. That the land embracing the Pine Tree Mine never formed any portion of the Carrington mine and that the Carrington Mine was a separate and independent mine Folio 22.

8th. The apex of the Rice vein was in and upon the Carrington Mine and the apex of the West vein was upon the Pine Tree Mine. These viens intersected within the Pine Tree Mine, and continued downward below the line of intersection. The ore and gold in controversy was discovered at the space of intersection of these veins by the plaintiffs in error, Voss and Rice, and appropriated by them. Folios 21--30.

The foregoing findings of fact show that the location of the Carrington Mine was made seven years prior to the location of the Pine Tree Mine, that these mines were held as separate and distinct mines from the time of their locations at least down to the month of June 1872, when Gillis purchased the same from Carrington.

The above mentioned Act of Congress was passed May 10th, 1872, and was in force from and after that date. By its provisions the ore and gold contained within the space of intersection of the Rice and West veins belonged to and was part and parcel of the Carrington mine—it being the prior location—as much so as the apex of the Rice vein was a portion of the Carrington mine. The statutes provide, "Where two or " more veins intersect or cross each other, PRIORITY OF " TITLE shall govern, and such prior LOCATION shall be " entitled to all ore or mineral contained within the " space of intersection."

Now it inevitably follows, that if the Carrington mine preserved its priority of location, then the ownership to the ore and gold in controversy herein must be determined in accordance with Section 2336 of the Revised Statutes of the United States and adjudged to be the property of the plaintiffs in error.

The Supreme Court of the State of California decided that Section 2336 of the Revised Statutes of the United States has no application to the facts of this case, and that the effect of the deed from Gillis to Stinchfield the defendant in error, was to estop him, Gillis, and those claiming under him, from questioning the title of Stinchfield to all of the gold that might be found in the West vein within the surface lines of his deed, and that as the deed contains no reservation, the entire West vein within the surface lines, even though intersected by another, passed to Stinchfield

With all due deference for the opinion of the Supreme Court of this State, the plaintiffs in error do not claim any gold contained in the West vein either within the Pine Tree Mine or within the Carrington Mine should the West vein penetrate that mine in its downward course

The findings of fact do not show that the gold was found in the West vein any more than in the Rice vein. There is no finding that the Rice vein cut through the West vein and preserved its continuity or that the West vein cut through the Rice vein at this point.

The finding is that both veins intersected at this point. By that intersection, there was a union of both veins, a blending of the quartz matter of both veins, and the gold contained in that united and blended mass of ore was as much a part of the Rice vein as it was of the West vein and it would be as impossible to distinguish which portion was the West or Rice veins, as it would be to say what drops of water at the confluence of two rivers flowed down one stream or the other. The plaintiffs in error are unable to perceive in what manner the deed from Gillis to Stinchfield estops them from claiming the gold in controversy in this action It should be borne in mind that these parties were dealing with mineral land, the title to which was in the United States, and that Stinchfield took the title to the Pine Tree Mine subject to the characteristics of mining property given to it by prevailing customs and laws.

The prevailing customs and laws gave to him the title to all veins, lodes and ledges, apexing upon the Pine Tree Mine, throughout their entire depth, although such veins, lodes or ledges, may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location. And if such veins, lodes or ledges intersected or crossed any vein, lode or ledge, apexing upon the Carrington or other mining claim, then the ore and gold at the space of intersection shall belong to the prior location.

The same mining customs and laws, gave to Gillis the same rights to all veins, lodes and ledges apexing upon the Carrington Mine, that Stinchfield had to the veins, lodes and ledges apexing upon the Pine Tree Mine, as above mentioned, and hence we repeat that we are unable to perceive in what manner the deed in question could estop the plaintiffs in error, from claiming the gold involved in this action.

But it is maintained by the defendant in error, that Gillis held the Pine Tree Mine and the Carrington Mine as a single mining claim, from the time of his purchase in June 1872, until the sale of the Pine Tree Mine to Stinchfield on January 17th, and that there was not any prior location of the Carrington Mine at the time of the sale of the Pine Tree Mine to Stinchfield and that therefore Section 2336 of the Revised Statutes of the United States did not apply.

In the determination of such contention, it will be necessary to examine and consider the findings of fact by the Court below, to see if it is supported by them.

The Court below, found, as facts: 1st For about fourteen years immediately prior to the 17th day of January 1886, the mining claim described in the complaint, as the Pine Tree and the mining claim now known as the Carrington, which lie side by side, were held, and claimed by the defendant Gillis, as a single mining claim, known and designated as the "Carrington" or old, Carrington (Folio 20, Page 10)

According to that finding the Carrington claim was held as a separate and distinct claim for a period of eighteen years. That is to say from the Spring of 1854, down to June 1872, and the Pine Tree Mine was held by Carrington as a distinct and separate claim for twelve years, commencing from the date of its location in the year 1859 or 1860, down to the time of the sale to Gillis in June 1872.

2. The Court further found, as follows: "During all the time that said piece of mining ground was in the possession of Gillis it was held by him as one mining claim and was known and described by him and by everybody who had anything to do with or concerning it as the Carrington claim or Old Carrington claim and not otherwise, (Folio 21)

3. That in July 1870, T. E. Carrington moved away and left his mining ground in charge of one Richard Stocker instructing Stocker to do the assessment work, Carrington did not tell Stocker, that there was a

Pine Tree Mine, or Pine Tree claim or Pine Tree location. Stocker took possession of the ground in which the Carrington and Pine Tree veins lay, and held it as one mining claim until June 1872. During that time from July 1870 to June 1872, there was no claims nor any location known as the Pine Tree, Stocker did not know of any such location or claim. All the ground now known as the Carrington and Pine Tree mines was then held and known as the Carrington claim and such assessment work as was done was done upon said ground as and for the Carrington claim (Folios 22-23)

4. Gillis took possession of said ground and held the same as the Carrington claim and not otherwise until the date of his transfer of a portion thereof to plaintiff in January 1886 The deed from Carrington to Gillis did not mention any vein or location by the designation Pine Tree. In said deed the Carrington claim was described as the whole of being 1000 feet the Carrington, (Folio 23.)

From the forgoing portion of what are designated findings of fact as found by the Court, below, and as the remainder of such designated findings of fact, are of like character and for the purpose of avoiding prolixity and repetition, we will refer the Court to the transcript in which they are contained viz: (Folios, 24-25-27.)

The plaintiffs in error respectfully submit that these findings do not establish the ultimate fact upon which the Supreme Court based its decision: Namely, that the Carrington Mine and the Pine Tree location became and were one mining claim from and after the time Stocker had charge of them in July 1870.

During the time that Stocker was in the possession of these claims, as the agent of Carrington, his acts and conduct in connection with them, as shown by the findings, did not extinguish the separate and distinct character that these claims had. It made no difference whether he thought these two parcels of mining ground constituted one mining claim or two or more. Neither did it make any difference that he only performed assessment work on the Carrington location, his failure to perform work upon the Pine Tree Mine, would not constitute it a part of the Carrington claim, nor would any or all of his acts in this connection produce the effect claimed by the defendant in error. Distinct and separate mining locations are not extinguished in any such manner. He was simply the agent of Carrington to keep the possession of this property for his principal, and was not authorized to change the status of these mines as they were when they were placed in his charge.

The finding that Stocker held these mining claims as one claim is not a finding of a new or different fact from those above mentioned, but is only a conclusion drawn from them. And this finding does not add any force or greater effect to these probative facts from which it is drawn, than these probative facts, possess (if any) in establishing or tending to establish the ultimate facts of this case, namely: That these two mining locations or claims were converted, changed and became merged into one claim. The Carrington location and the Pine Tree Mine were separate and distinct locations and mines. Their extent and boundaries were defined and known, (the former being known in the Spring of 1854, as the Carrington vein, and the latter, in either the year 1859 or 1860, at the time of its location was known as the Pine Tree vein,) and their separate and distinct identities could not be extinguished and become merged in a single claim, in any other manner except by re-locating a single mining claim, embracing these claims, not exceeding fifteen hundred feet in length and three hundred feet in width on each side from the middle of the vein and posting notices of location at each end of the claim, and by marking the boundaries on the surface so that they could be readily traced.

There is not any finding that Stocker or Gillis ever altered or changed the boundaries of these claims, as established by Carrington, or that either of them made or attempted to make a re-location of the same.

And in concluding our argument upon this point, we contend, that the Carrington mine and the Pine Tree mine have always been separate and distinct claims, preserving their different characteristics from the time Carrington carved them out of the public domain, the former in 1854, and the latter in 1859 or 1860, down to the present time. And we respectfully submit that this Honorable Court would be justified and the facts would warrant it in adopting this view of the case, and rendering judgment in conformity therewith.

In this connection and for the purpose of avoiding a repetition of the above argument, we respectfully request the Court to consider the same, as applying to the findings showing the acts and conduct of Gillis in connection with these claims while he owned them, so far as such argument may be pertinent and relevant

The second and third assignment of error, (Folios 264,) are substantially the same as the first assignment of error heretofore considered, the same argument and specification of errors already made relating to the first, will fully apply to them and thereby avoid the necessity of repetition and we request the Court to consider them as embodied in the first and that the argument and specification of errors heretofore made may be made applicable to them.

Fourth Assignment of Error—that the Supreme Court of the State of California erred in adjudging that all the gold found at the space of the intersection of these two veins belonged to the plaintiff Stinchfield, because even if the findings of the Court that these claims were held by the defendant Gillis as one claim were warranted by the evidence, then the gold at the space of intersection of these veins was the joint property of the plaintiff and the defendants and the ownership to which would be determined in accordance with the spirit and manifest objects of the Mining Statutes of the United States, which govern, regulate, and determine the ownership of the gold and ore at the space of intersecting and uniting veins in the public mineral lands of the United States, (Folio 265.)

The plaintiffs in error contend that the Supreme Court erred in deciding that the gold in controversy belonged to the defendant in error and that Section 2336 of the Revised Statutes of the United States did not apply to the facts of this case.

It the Carrington and Pine Tree Mines constituted a single mining claim, at the time of the sale of the Pine Tree Mine to Stinchfield, thereafter they were distinct claims the boundaries of which were distinctly defined, each containing several veins and each retaining the original names given to it by the original locator, T. E. Carrington.

The plaintiffs in error discovered the gold within the walls of the Rice vein which apexed upon the Carrington Mine at a point where that vein and the West vein apexing on the the Pine Tree Mine, intersected within the Pine Tree Mine. At the point of intersection these veins blended together, and formed one mass of quartz in which this gold was contained. Of this united and blended mass of ore and the gold contained therein, the plaintiffs in error and the defendant in error were the equal owners, tenants in common each owning an undivided half thereof. And this right to an equal division of the gold. herein, should be determined in accordance with the spirit and object of the Statute in question. which was enacted to regulate and determine the ownership of the gold and ore and mineral contained within the space of intersecting and uniting veins, or lodes, upon the mineral lands of the public domain of the United States. And this Court in the exercise of the general principles of equity should mould this law to the facts and award substantial justice to the plaintiffs in error which we contend was denied them by the Supreme Court of this State.

Fifth Assignment of Error—The Supreme Court of California further erred in adjudging that the plaintiff Stinchfield, by reason of his deed from the defendant Gillis, was entitled to all the mineral within the Pine Tree Mine, in this: that under the Mining Statutes of the United States the defendant Gillis was the owner of all the veins apexing on the Carrington Mine, and he was entitled to follow those veins upon their dip, within the vertical end lines of the Carrington Mine into and through the Pine Tree Mine. Folio 265, Page 119.

In our judgment too much importance has been attached to this deed. It has been regarded as the controlling factor in the determination of this controversy. The Supreme Court say that the plaintiff in error, J. N. Gillis and those claiming under him are estopped from claiming any gold contained in the West vein within the Pine Tree Mine, by reason of this deed.

Now, we disclaim any right to any gold contained in the West vein proper, within the Pine Tree Mine or within the Carrington Mine in the event that that vein penetrates the Carrington Mine. We concede to him the right to follow any vein apexing upon the Pine Tree Mine and penetrating into the Carrington Mine and to take the gold contained in such vein or veins. This right is secured to him by the Statute, and not by the deed. The deed does not convey to him every vein and all minerals within the boundaries of the Pine Tree Mine. The old common law doctrine that the grantee in a bargain and sale deed owns all beneath the surface of the land described in his deed has been greatly modified and no longer obtains respecting the rights of miners and those claiming and using the mineral lands of the United States. The Revised Statutes above cited fixes the rule and allows the miner to follow his lode wheresoever it may go.

Under these Statutes we contend that the plaintiff in error J. N Gillis is and always has been the owner of all veins, lodes and ledges apexing upon the Carrington Mine and penetrating the Pine Tree Mine, wheresoever they may go.

In conclusion we beg leave to say that we exceedingly regret that we were unable to find any adjudged case by this Court or any decision by any other Court presenting the question involved in this controversy although diligent search of the reports of adjudged cases was made by us. We have however endeavored to present this controversy as fairly and fully as we were able to do, under the circumstances, and we feel that no matter what may be the outcome of this controversy, that this Honorable Court, the highest judicial tribunal in the land, will decide this case, in accordance with the rights of the parties, and we therefore respectfully ask that the judgment of the Supreme Court of the State of California be reversed.

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